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SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE of complaints filed under THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 5 - NOT TO BE PUBLISHED - July 1, 1937

I N D E X

PACA SUMMARIES OF DECISIONS NOT TO BE PUBLISHED

S-1340, July 16, 1936, Docket 1994: (S.P.)

BAKER PRODUCE CORPORATION, NORFOLK, VA. v. FLORIDA FRUIT & PRODUCE CO., JACKSONVILLE, FLORIDA.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Suitable shipping condition.
Order: Complaint dismissed.

Outline of Facts

On or about June 19, 1935, complainant sold to respondent a carload of U.S. No. 1 Cobbler potatoes at the agreed price of $1.75 per bbl. f.o.b. Norfolk, Va. A lot of 200 bbls. was shipped from Norfolk, Va. to Jacksonville, Florida, where the potatoes were rejected by respondent who contended that they were not in suitable shipping condition at time of shipment. Complainant sought an award for $153.60, the alleged loss sustained after resale for the net sum of $181.40.

Federal-State inspection made at Norfolk, Va. on June 19, 1935, the date of shipment, showed that the potatoes graded U.S. 1 and the "Stock is firm and mostly fairly clean, many slightly dirty. Grade defects within tolerance. Less than one-half of one per cent soft rot". The potatoes arrived at Jacksonville, Florida on Saturday, June 22, and Federal inspection, restricted to condition only, which was secured the following Monday morning showed "Stock is firm. Decay irregular, practically all the samples examined show decay ranging from one per cent to ten per cent, average approximately four per cent. Decay is slimy soft rot, mostly in advanced stages".

Ruling included in Decision

Respondent properly rejected the potatoes here under consideration, since they were not in suitable shipping condition at the time of shipment. It is admitted that the certificate of Federal inspection made at shipping point showed compliance with the contract, as contended by complainant, but the destination inspection certificate, while not covering an appeal inspection,

must be taken into consideration as evidencing inherent defects which were necessarily present at the time of shipment, although not readily apparent at that time. These inspection certificates, however, were not in direct conflict, since the shipping point certificate showed one-half of one per cent of soft rot to have been present at the time of shipment, which is sufficient indication that a considerably higher percentage of decay would in all probability be found at destination.

S-1342, July 22, 1936, Docket 2136: (S.P.)

THE RUBIN CO., CHICAGO, ILL. v. COHN FLOUR & FEED CO., BATON ROUGE, LA.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Proof of terms of contract.
Order: Complaint dismissed.

Outline of Facts

On or about December 2, 1935, complainant and respondent engaged in a telephone conversation relative to the sale of a carload of potatoes by complainant to respondent at the delivered price of $1.45 per cwt., or for the net sum of $237.60. Thereafter complainant diverted a carload of potatoes from Chicago, Illinois to respondent at Baton Rouge, La., which shipment, on arrival at destination, was rejected by respondent, who contended that the potatoes were not up to contract requirements. Resale netted complainant $52.10 and an award for the alleged loss of $185.50 was sought.

The parties were in disagreement with reference to the grade and quality of the potatoes to be delivered by complainant, complainant contending they "were strictly U.S. 2 and nothing else, and that they contained cut potatoes and for this reason it made them U.S. 2" while respondent denied that U.S. Grade 2 was mentioned during the telephone conversation and stated complainant advised that the potatoes quoted "were of splendid quality, the only objection to them being they contained a few cuts and were a little large in size".

Ruling included in Decision

Complainant failed to prove the terms of the contract upon which this proceeding was based. The record showed that on December 2, 1935 complainant wrote respondent a letter confirming a telephone conversation of that date regarding the sale of a carload of U. S. 2 potatoes at the delivered price of $1.45 per cwt., but this could not be taken as sufficient proof of the sale, particularly when respondent denied the purchase of potatoes of the kind and grade specified in the letter. The record contained no confirmation of any kind whatsoever signed by respondent. Oral contracts which are not confirmed in writing are likely to be unsatisfactory, frequently result in misunderstandings, and are, therefore, voidable in many States by legislation commonly known as the statute of frauds. The State of Louisiana has no such statute, nevertheless complainant was charged with the burden of proving the allegations of its complaint and the record showed that it failed in this respect.

C-1344, July 22, 1936, Docket 2195: (S.P.)

MARION PRODUCE CO., MARION N. Y. v. THE H. J. McGRATH CO., BALTIMORE, MD.

Violation charged: Unjustified rejection of a carload of beets.
Principal points involved: Purchase for canning purposes not controlled by Federal inspection; payment of freight and unloading of samples not necessarily acts of acceptance.
Order: Complaint dismissed; respondent awarded $69.35 with interest.

Outline of Facts

In the month of November, 1935, complainant sold to respondent "one car of New York State canners' red cutting bulk beets at $16.70 per ton delivered size mostly two to three half inches". The beets were shipped from Manchester, N. Y. to respondent at Baltimore, Md., where they arrived on or about November 13 and were inspected and rejected by respondent because they did not conform to sale specifications and were not suitable for canning purpose. Afterwards, having agreed to accept the shipment and handle for complainant's account, respondent made a test of samples at its factory,

which test disclosed that the beets, when steamed and skins removed, released an objectionable odor and were not suitable for canning purposes and that they did not cut red but many of them had white centers and were affected by dry rot. The shipment was abandoned to the railroad company, which made sale thereof and tendered to complainant the proceeds of $56.75. Complainant asked for damages in the sum of $133.95 and respondent asked reimbursement for the freight charge of $69.35 paid by respondent.

On November 18 a Federal inspector examined samples and issued a certificate wherein he certified that the "stock is generally firm, fairly clean and fairly smooth to smooth, average of 5% grade defects consisting of dry rot, mechanical injury and growth cracks" and that they met the "requirements of U. S. No. 1 topped" beets.

Rulings included in Decision

1. The Federal inspection was not regarded as having a controlling effect on the rights and obligations of the parties. The purchase was not made on the basis of Federal grade, but for canning purposes. It appeared that steaming of the beets and removal of the skins were necessary to respondent's inspection of the load in order to determine whether they were suitable for canning purposes.

2. Neither the payment of freight charges by respondent nor the unloading of the samples used for the factory test above referred to was an act of final acceptance. The Uniform Sales Act, which has been adopted in the State of New York as well as the State of Maryland, provides that "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

3. Respondent's rejection of the beets was not without reasonable cause. Respondent's complete inspection disclosed that many of the beets did not cut red and had white centers. Such condition, in addition to the dry rot found and the release of a bad odor, was considered justification for respondent's refusal to accept the load and the complaint was therefore dismissed.

4. Respondent was awarded $69.35, with interest.

S-1347, July 29, 1936, Docket 1601: (S.P.)

J. E. NELSON, ALTOONA, PENN., v. SID KYMAN COMPANY, CLEVELAND, OHIO.

Violation charged: Unjustified rejection of two carloads of potatoes.
Principal points involved: Branded bags not showing state of origin; speculative damages.
Order: Complaint dismissed; countercomplaint dismissed.

Outline of Facts

On August 14 and August 15, 1934, through a broker, complainant sold to respondent two carloads of U. S. No. 1 Cobbler potatoes in branded bags to be shipped from Virginia at the agreed price of 85¢ per bag, or $255.00 for one car and 80¢ per bag, or $240.00 for the other, f.o.b. shipping point. The potatoes were shipped from loading points in the State of Virginia to Cleveland, Ohio, where they were rejected by respondent. They were then resold by complainant, one car for a net of $208.00 and the other for a net of $215.58. Complainant sought an award for the alleged loss of $71.42, the difference between the contract price and net resale price, while respondent in a countercomplaint sought an award for $36.00 loss on one car and $51.00 on the other, or a total of $87.00 suffered by reason of the failure of complainant to ship two carloads of potatoes in accordance with the specifications of the contract.

Rulings included in Decision

1. Respondent's rejection was not without reasonable cause since the potatoes did not comply with the specifications of the contract of sale. The evidence disclosed that the shipments originated in the State of Virginia but were packed in bags branded "J. E. Nelson Brand, Altoona, Pa.", thus failing to show the correct State of origin and that the potatoes in one car were certified as "U. S. No. 1 - 1-3/4 in. minimum" and were therefore not responsive to contract specifications. The complaint was therefore dismissed.

2. The damages asked by respondent were wholly speculative and in the absence of any proof whatever must be denied. The countercomplaint for damages was based on the difference between a "fair market value of the potatoes had they conformed to the specifications of the contract and their fair market value in containers in condition in which they did arrive". The countercomplaint was dismissed.

S-1349, July 30, 1936, Docket 1899: (Hearing)

WOLF & COHEN, PHILADELPHIA, PA., v. S. LANDOW FRUIT & PRODUCE CO., INC., NEW HAVEN, CONNECTICUT.

Violation charged: Unjustified rejection of a carload of oranges.
Principal points involved: Terms of oral contract; delivered sale.
Order: Complaint dismissed.

Outline of Facts

On or about January 10, 1935, by oral contract, complainants sold to respondent a carload of oranges which had been shipped from Lady Lake, Florida, and was then on track at Philadelphia, Pa., consisting of 402 boxes, at the agreed price of $2.90 per box, to respondent at New Haven, Conn. Upon arrival at New Haven on or about January 12, respondent inspected the shipment and refused to accept it for the alleged reason that inspection showed the presence of excessive decay and dryness. Thereafter complainants diverted the car to Boston, Mass., and resold it for a net return of $200.52, and sought an award for the loss sustained.

Federal inspection certificate issued January 12 certified that the "stock fails to grade U. S. No. 1 in old Dobbin brand only account decay and dryness. Fails to grade U. S. No. 2 in Martin brand account dryness," and the condition as "mostly firm, many light-weight and soft; Old Dobbin brand generally shows 10 to 60%, averaging approximately 35%, showing more than one-fourth inch dryness, generally at stem end; and averaging 4% decay. Martin brand generally shows from 10 to 30%, averaging approximately 20% showing more than one-half inch dryness and averaging 2% decay. Decay is blue mold rot, mostly in advanced stages."

Rulings included in Decision

1. It was believed that the oral contract called for a car of oranges that "would not have any dry oranges with the exception of a little dry stem end once in a while" as well as being free from decay, at a delivered price of $2.90 per box. Such agreement could not thereafter be changed to a Philadelphia "acceptance final" agreement by the mere sending of complainant's wire of January 10 advising respondent the car had been inspected and diverted "delivered acceptance here final." Complainant's claim as to Philadelphia acceptance final was also inconsistent with the allegations of the original complaint, to which was

attached as an exhibit a purported confirmation of sale wherein the transaction was designated as made at a delivered price. Such confirmation was dated Jan. 10 and apparently reflected the terms and conditions of the agreement as complainants then understood them. It seemed entirely natural that respondent would be interested in securing sound heavy oranges, in view of his knowledge that in 1934 oranges purchased in sections of Florida were known to be subject to frost injury. Respondent's wire of Jan. 12 indicated that something was said in the prior telephone conversation concerning dry stem end oranges.

2. Considered as a delivered price transaction, respondent's refusal to accept the shipment was not a rejection thereof without reasonable cause. The complaint was therefore dismissed.

S-1350, July 30, 1936, Docket 2003: (Hearing)

JOSEPH JUSTMAN & CO., INC., NEW YORK, N. Y. v. SACKS BROS., LIBERTY, N. Y.

Violation charged: Unjustified rejection of a carload of lettuce.
Principal points involved: Interstate commerce character of shipment; noncompliance with Statute of Frauds of State of New York; mere retention not acceptance.
Order: Complaint dismissed.

Outline of Facts

On or about July 30, 1935, complainant and one member of respondent partnership firm engaged in conversation, during which complainant offered to sell and respondents agreed to purchase a carload of lettuce at $3.35 a crate, but the evidence was conflicting with reference to the kind, quality and grade of lettuce offered by complainant and the requirements in this respect specified by respondents. Prior to the conversation the lettuce had been shipped from Salinas Calif. to complainant at New York, N. Y., and immediately following said contract of sale was diverted by complainant to respondents at Liberty, N. Y. On arrival of the shipment at Liberty, respondents examined the lettuce and promptly rejected it, claiming that it did not meet contract requirements, whereupon complainant and respondents engaged in a telephone conversation, during which respondents agreed to assist complainant in disposing of the lettuce, but failed to find a purchaser or purchasers, and the railroad agent thereafter notified complainant that the shipment had been finally rejected by respondents. On being notified by the railroad agent of the rejection, complainant resold the lettuce in New York City at a loss of $539.77, and it was for the recovery of this sum that an award was sought.

Respondent contended that the facts and circumstances as set forth by the complaint brought this case clearly within the Statute of Frauds and therefore rendered it unenforcible since the Statute of Frauds provides that the sale of any goods or choses in action of the value of $50.00 or upwards should not be enforcible unless a portion of the goods were accepted, something paid in earnest to bind the contract, or some note or memorandum in writing be signed by the party to be charged or his agent.

Immediately upon the opening of the hearing respondents moved to dismiss this case, contending that, since the transaction took place wholly within the State of New York, no interstate commerce was involved, and the Secretary of Agriculture therefore had no jurisdiction. The examiner promptly overruled this motion, since it was clearly shown that at the time of the negotiations here under consideration the shipment remained in the car in which it had been shipped from Salinas, California to complainant at New York City, and although the unbroken car was diverted to respondents in the State of New York it was nevertheless continuing in interstate commerce, since it originated in California and was only diverted to New York.

Ruling included in Decision

The parties did not enter into a legal and binding contract in this instance because the record clearly disclosed that they failed to comply with the requirements of the New York Personal Property Law, commonly known as the Statute of Frauds, which is applicable in such cases. No writing or memorandum of any kind whatever was made in connection with either of the previously mentioned telephone conversations, nor was any sum of money paid by respondents, and there was no proof that respondents took possession of any portion of the shipment within the meaning of the law of the State of New York commonly known as the Statute of Frauds. Mere retention of the shipment without proof of actual acceptance is not sufficient to remove the transaction from the Statute. (Court opinions are cited.) The complaint was therefore dismissed.

S-1361, August 14, 1936, Docket 1955: (S.P.)

NATHAN LEVINSON, PRESIDENT OF LEVINSON FRUIT CO., OMAHA, NEBR. v. NORTH MICHIGAN PICKLE COMPANY, GREEN BAY, WISCONSIN.

Violation charged: Failure to deliver a carload of cabbage.
Principal point involved: No contract between complainant and respondent.
Order: Complaint dismissed.

Outline of Facts

On or about January 24, 1935, a broker at Omaha, Nebr. transmitted to respondent an order for a carload of cabbage to be shipped to complainant from loading point in the State of Wisconsin to Omaha, Nebraska, which had been quoted to the broker as a car of good Holland cabbage at $8.00 per ton f.o.b., including brokerage. Respondent advised the broker that he was not acquainted with complainant and that the cabbage would be shipped to the broker for his own disposition and collection. On January 30 respondent wrote the broker to the effect that the cabbage had been purchased from a grower but that severe cold weather had resulted in its freezing, and indicated that the order would not be filled. Complainant thereafter, on or about February 1, purchased a carload of cabbage from another party at a price considerably higher than $8.00 per ton and sought to recover the difference in price as damages from respondent.

Ruling included in Decision

There was no contract between complainant and respondent for the carload of cabbage in controversy. The exchange of wires quoted in the decision indicated that respondent was not acquainted with complainant firm and for this reason did not care to enter into a contract with complainant and that the shipment herein involved was confirmed to the broker with the advice that he could "make your own delivery and collection." The complaint was dismissed.

S-1362, August 18, 1936, Docket 1800: (Hearing)

WESCO FOODS CO., CHICAGO, ILLINOIS. v. MEFFERD BROTHERS, LOS ANGELES, CALIF.

Violation charged: Failure to account in connection with certain carloads of oranges.
Principal points involved: Blue Mold Rot a factor of condition; lack of proof of authorized resale at auction.
Order: Dismissed.

Outline of Facts

On or about August 8, 1934, complainant contracted to purchase from respondents seven carloads of Sunrise brand, first class Valencia oranges, at the net price of $2.50 per box f.o.b. California shipping point, "to be average 8½ lbs. net, good color, some slight greenish tinge, stem end", it being agreed that "Wesco, Los Angeles office will issue draft when cars loaded. While this is an f.o.b. purchase, Mefford Bros. agree to stand behind deal if serious complaint of quality or pack at destinations." Complainant's representative inspected the oranges and supervised packing and loading in accordance with trade customs in such cases, and paid the full contract purchase price for each carload at the time of shipment. Seven carloads were shipped to points in Arkansas, Michigan and other Central States as instructed by complainant, who upon arrival of four of the carloads at destination objected to the damaged condition, which was alleged to be due to Blue Mold Rot, and these four carloads were resold by complainant at auction at a loss of $1388.90, for recovery of which this complaint was filed.

Complainant alleged that the parties entered into an agreement providing for the sale of the oranges at auction, respondents to protect complainant against any loss; this was denied by respondents, who disclaimed any liability because of the decay, contending that they had nothing to do with the warranty as to quality and pack but was a condition caused by the heavy pack required by complainant.

Rulings included in Decision

1. The heavy pack which was supplied on the demand of the buyer resulted in the bruising of the fruit in transit and this bruising permitted the development of the Blue Mold Rot, which caused the principal objection by the complainant. The amount of Blue Mold Rot shown to have been present in the oranges at destination could have occurred only as the result of a considerable amount of bruising of the fruit. The "Hand Book of the

Diseases of Fruit Appearing Under Market, Storage and Transit Conditions", prepared by the U.S. Department of Agriculture, states that "Blue Mold Rot is present everywhere but is unable to attack the fruit unless the skin has been broken in some way". The oranges could not have been badly bruised at the time of loading or complainant's agent would have rejected them.

2. In view of the decay caused by bruising resulting from the heavy pack required by complainant and the fact that the fruit was inspected and accepted by the buyer's agent, no responsibility would seem to attach to respondents unless it could be shown that respondents authorized the sale of these oranges at auction. By making this contention complainant imposed upon itself the burden of proof and this burden it failed to sustain. The complaint was therefore dismissed.

S-1363, Aug. 18, 1936, Docket 2067: (S.P.)

SHACKELFORD BROWN CO., ALBANY, GA. v. WEINBERG & GILBERT & H.C. MacCLAREN, BOTH OF DETROIT, MICHIGAN.

Violation charged: Unjustified rejection by Weinberg & Gilbert; false and misleading statements by H.C. MacClaren.
Principal points involved: Exchange of wires rather than broker's standard confirmation indicated contract; addition of specification in broker's confirmation not for fraudulent purpose; peaches not in suitable shipping condition.
Order: Complaint dismissed.

Outline of Facts

By wire dated June 9, 1935, complainant quoted respondent, H.C. MacClaren, Pine Mountain Early Rose peaches 1-3/4 inch minimum at 65¢ and 2 inch minimum at 75¢ per half bushel tub. MacClaren on the following day wired complainant a counter-offer submitted by respondent Weinberg & Gilbert at 60¢ per half bushel tub "providing high red color". Complainant confirmed the order and on June 10 diverted to Weinberg & Gilbert a rolling car which had been loaded at Thomaston, Ga. on June 8. Respondent MacClaren issued the usual form of standard confirmation of sale wherein the commodity was described as "One car Pine Mountain Early Rose Peaches U.S.No. 1 good pack, quality excellent, 623 - 1¾" minimum, 119 - 2" minimum, 60¢ per half tub bushel" f.o.b. shipping point. The car arrived at Detroit, Michigan, on June 12, where, after securing Federal inspection on the day of arrival, it was refused by Weinberg & Gilbert for the alleged reason that the peaches did not conform to complainant's warranty.

Complainant made resale for a net return of $245.50 and sought an award for claimed damages of $199.70, charging Weinberg & Gilbert with unjustified rejection and that MacClaren violated the Act and thereby became liable to complainant because he was not authorized by Weinberg & Gilbert to transmit the order except in the form set out in his standard confirmation of sale. The confirmation of sale issued by him did not correctly set forth the contract between the parties.

Federal inspection at loading point made two days prior to sale showed the stock as then "mature, generally clean, well formed, mostly firm, many hard * * * . Grade defects within tolerance. No decay", and that it graded U. S. No. 1. After Federal inspection at Detroit, Michigan on June 12 the load was certified as failing to grade U. S. No. 1 minimum size as marked only on account of decay having an average of 2% of peaches with soft spots. Samples taken from the top layer showed an average decay of 6% in the baskets that were stamped 1 3/4" minimum and an average of 5% decay in the baskets stamped 2" minimum; in the third layer the average of decay amounted to 2%; the decay found was "mostly Brown Rot, many Rhizopus Rot, mostly in early stages, many in advanced stages." By the term "mostly" the inspector meant from 55 to 90%. In the use of the word "many" he meant from 25 to 45%. The car moved under standard refrigeration. The inspector certified that its bunkers were filled with ice to within ten inches of the tops. The temperature at the bottom of the doorway was stated at 44°.

Rulings included in Decision

1. Respondent MacClaren was complainant's agent and complainant must rely upon the contract made by its agent. The real contract of the parties consisted of the exchange of wires. MacClaren's submission of the counter-offer of respondent Weinberg & Gilbert made him to that extent the agent of both parties. In addition to a reduction in price the counter-offer stipulated that peaches be furnished of "high red color." Such action by MacClaren did not amount to a violation of the Act. Moreover, if complainant was dissatisfied with the order as received it need not have been confirmed. Admittedly MacClaren's standard confirmation of sale added the specification "U. S. No. 1 good pack." MacClaren's explanation was that in a prior telephone conversation with David Brown of complainant company it was stated that complainant's offerings would be of U. S. No. 1 grade and of good pack and quality, and he called attention to complainant's specification "quality is excellent" which he stated was understood as meaning that they were grade U. S. No. 1 or better. MacClaren's inclusion of the specification "U. S. No. 1 good pack" in the standard confirmation of sale did not appear to have been done for a fraudulent purpose within the meaning of Section 2 of the Act. The complaint was therefore dismissed as to MacClaren.

2. The refusal of Weinberg & Gilbert to accept the shipment was not a rejection without reasonable cause. Complainant's warranty was as to quality at the time of sale. Notwithstanding the shipping point certificate, the condition of the load only four days later made it clear that the stock was not in fact in suitable shipping condition at the time of sale. The complaint was dismissed as to Weinberg & Gilbert.

S-1368, Sept. 1, 1936, Docket 2024 & 2019: (S.P.)

GEO. W. HAXTON AND SON, INC., OAKFIELD, N. Y. v. CURTIS & CO. INC., BOSTON, MASSACHUSETTS AND COUNTERCOMPLAINT.

Violation charged: Failure to account for a truckload of pears.

Principal points involved: Actual market value due in case of breach of warranty; dirty and undersized stock not defects which develop in transit; speculative loss of profit.

Order: Complainant awarded $113.86; respondent's countercomplaint dismissed.

Outline of Facts

During the month of October, 1934, complainant sold to respondent 130 bushels of U. S. No. 1 Seckel pears warranted as size 1-1/4 inch upward, at $1.40 per bushel, and 86 bushels U. S. No. 1 Seckel pears, size 1-1/2 inch upward, at $1.75 per bushel, or a total price of $332.50 delivered Boston, Mass. Complainant shipped the pears from Lyons, N. Y. and they were accepted by respondent who made resale for a net return of $113.86. A check for that amount was tendered to complainant but refused, and complainant sought an award for the contract price of $332.50.

Respondent contended that the pears did not meet contract specifications because of decay, undersize and dirty appearance and that it was damaged in the sum of $218.64 actual loss and $121 loss of profits, for which an award was asked in its countercomplaint.

Destination Federal inspection of the load on the 18th showed an average of 5% grade defects in the 1-1/4 inch mark stock and an average of 10% grade defects in the 1-1/2 inch mark stock and the latter mark generally slightly dirty or scarred detracting from the appearance of the lot; in both marks most pears had stems broken at various lengths; decay in the load averaged 5%, being Blue Mold and Gray Mold Rots in early to advanced stages. Under the heading "Grade" the inspection certificate stated:

"1-1/4 in. mark grades U. S. No. 1, 1-1/4 inch min., decay being a factor of condition. 1-1/2 in. mark stock does not meet requirements of U. S. No. 1, 1-1/2 in. min. account generally slightly dirty appearance in most baskets and undersize in excess of tolerance."

Rulings included in Decision

1. The record showed complainant's breach of warranty. This being a delivered sale transaction, complainant was required to tender pears at delivery point that conformed to U. S. No. 1 grade requirements as to both quality and condition. Complainant contended "that the reason the 86 bushels * * * did not meet requirements was due to rough handling en route by the truck." Such claim, however, did not agree with the destination inspector's certificate. The "generally slightly dirty appearance" of the pears "in most baskets and undersize in excess of tolerance" were defects that did not develop in transit.

2. Respondent should account to and pay complainant the actual market value of the pears as shown by the resale thereof. The Uniform Sales Act provides "Where there is a breach of warranty by the seller, the buyer may, at his election, accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price." Complainant was awarded $113.86.

3. The evidence as to respondent's claimed loss of profits was considered too speculative and uncertain to support findings of fact in respondent's favor. Respondent's counter complaint was dismissed.

S-1373, Sept. 9, 1936, Docket 2141: (S.P.)

CAMBRIDGE FRUIT & PRODUCE CO., CAMBRIDGE, OHIO v. COONEY & KORSHAK, CHICAGO, ILLINOIS.

Violation charged: Failure to ship a carload of onions conforming to contract specifications.

Principal points involved: Average of 20% decay two days after arrival indicative of nonconformance with contract at time of arrival; damages must be based on replacement of same grade and quality of goods purchased within reasonable time at nearby market at carlot price.

Order: Complaint dismissed.

Outline of Facts

Complainant and respondent entered into a contract, through a broker, on May 18, 1935 for the purchase and sale of "One (1) Car U.S. Commercial White Bermuda Wax Onions, 85% U.S. #1, - $2.10 per bag, in new branded saxolin 50# bags. Delivered." The onions were shipped from Texas and arrived at Cambridge, Ohio on the morning of May 20, where they were inspected by a Federal inspector on May 22. On the morning of May 20 the broker advised complainant by telegram that the shipper demanded acceptance and complainant advised the respondent by telegram that if the car of onions was not replaced by one that conformed to the contract a car would be purchased on the open market and claim filed "with Washington for difference". Complainant purchased at Cincinnati replacement onions as follows: May 21, 21 bags at $2 and 29 bags at $2.20; May 25, 90 bags at $2.25; May 29, 75 bags at $2.50; and June 4, 25 bags at $1.90, plus drayage of 35¢ per cwt. and sought an award for $173.40, the difference between the original contract price and the repurchase price.

Respondent maintained complainant delayed unduly in buying replacement onions and that a carload at a cheaper price could have been purchased at Pittsburgh, a distance of 90 miles and a large market, at less than the onions purchased in small quantities at Cincinnati, two hundred miles from Cambridge, and attached to its answer numerous exhibits including official market reports for onions at Pittsburgh and Cincinnati on May 21 to 25, inclusive.

Rulings included in Decision

1. The onions did not conform to the specifications of the contract of sale. The inspection certificate indicated they did not conform to the contract on the morning of May 20 for the reason that the decay averaged about 20% at the time the inspection was made on May 22.

2. Complainant did not establish any legal damages. It could not legally base damages on purchases of onions made in small quantities at a distant point on a rising market over a considerable period of time when it was shown that a carload of onions of the same grade and quality could be purchased at other markets to replace the onions at a considerably lower price. The official market reports of the Department which were introduced in evidence showed that the jobbing market for onions at Pittsburgh

from May 21 to May 24, inclusive, was materially lower for onions than what was paid for the onions at Cincinnati by complainant. Furthermore, complainant did not show whether the onions purchased were of the grade called for in the original contract or were a higher grade of onions. The complainant showed a breach of contract on the part of respondent but did not adopt the proper method of showing damages. The complaint was therefore dismissed

S-1374, Sept. 9, 1936, Docket 1739: (Hearing)

POSNACK & SENTER, INC., NEW YORK, N.Y. v. CONNELL-ROSS CO., INC. SAN BENITO, TEXAS.

Violation charged: Failure to deliver two carloads of tomatoes in accordance with contract.
Principal point involved: Seller has right to hold rolling cars at any point until payment received in accordance with contract.
Order: Complaint dismissed.

Outline of Facts

On May 21, 1934, respondent offered for sale, through a broker, two cars of tomatoes, basis rolling and cash. The contracts were entered into on May 22 and 23 for these two cars and the broker, acting as agent for both complainant and respondent, issued memoranda of sale specifying rolling cars, shipped the 18th or 19th. The sales were made f.o.b. and payment for the cars was to be wired by Postal or Western Union to the San Benito Bank & Trust Co. for the account of respondent. Complainant claimed that although the confirmation of sale specified the cars were to be rolling in transit, they did not arrive on the date on which they should have arrived had they been rolling; that subsequent investigation revealed they were not rolling but were held on track at intermediate points; and that due to such delay complainant suffered a loss of $1023.75 due to the market dropping between the days on which the cars should have arrived, May 25 and 26, and the day they actually arrived, May 28. Complainant sought an award in that amount.

Respondent claimed the cars were billed on the 18th and 19th and left San Benito and Donna, Texas at 2:30 A.M. May 19 and 3:45 A.M. May 20th, respectively and both cars were quoted approximately twelve hours before either reached a diversion point, and had been so traveling from the date of shipment; that on this cash sale funds were not received until May 24 and 25 and that the cars remained the property of the respondent until the terms of sale were complied with and it had the right and privilege of handling them as it desired.

Rulings included in Decision

1. The cars were actually rolling at the time the telegram was sent offering the cars on May 21 at 9:20 A.M. Railroad records submitted in evidence showed one car was shipped on May 19 and arrived at St. Louis at 7:45 P.M. May 21, where it remained on track until the morning of May 24, and that the other car was shipped from Donna May 20 at 3:45 A.M. and arrived at Little Rock, Arkansas May 21 at 9:25 P.M., where it remained on track until May 23 at 5:50 A.M. There was no showing that respondent again offered these cars as rolling, and although the contracts were entered into sometime afterwards, nothing further was said regarding this provision. At the time of actual sale of the cars they were not rolling but were on track at St. Louis and Little Rock awaiting diversion. The record showed that the contract for the first car was entered into May 22 at about 3:30 P.M. and that the second car was actually sold and confirmed May 23 at 9:35 A.M.

2. Respondent had the right under the terms of his offer to hold his cars at any point until the contracts were entered into or complied with by the payment of the purchase price agreed upon. Complainant's failure to transmit the money promptly to respondent resulted in the delay in diverting the cars. Although the terms of the sale specified the wiring of money by Postal or Western Union, complainant elected to pay for the cars through wires from the Chase National Bank to the Bank of the respondent at San Benito, Texas, the deposit slips of that bank showing that the money for the first car was actually deposited on May 24 and that for the second car on May 25. Therefore the cars were under the control of the respondent until those dates. The respondent, awaiting receipt of the purchase price, diverted the first car from St. Louis on May 24 and the second car from Little Rock on May 23. This was a cash sale and it was the duty of complainant to comply with the terms of the contract and remit payment to respondent before it could secure control of the cars.

3. Complainant failed to show that respondent's failure to deliver cars of tomatoes which were continually rolling in transit was without reasonable cause. The complaint was therefore dismissed.

S-1381, Sept. 23, 1936, Docket 2048: (S.P.)

S. KERZNER & SONS, PHILADELPHIA, PA. v. PHILIP LaMANTIA & BRO., NANTY GLO, PA.

Violation charged: Failure to account for a carload of watermelons.
Principal point involved: After acceptance, buyer may set up breach of warranty as ground for not paying full purchase price.
Order: Complainant awarded $60.43.

Outline of Facts

On or about July 22, 1935, through a broker, complainant sold to respondents one carload, consisting of 1324, U.S. No. 1 Wonder watermelons, red cutters, in good condition, at the contract price of $140 f.o.b. South Carolina shipping point, which, together with the transportation charges of $171.70 paid by respondents, placed the total cost of the shipment to respondents at $311.70. On arrival of the shipment at Nanty Glo, Pa. respondents objected to the quality and condition of the melons and secured a railroad perishable inspection report which showed that 338 melons were so badly damaged by anthracnose that they were worthless. Complainant sought an award for the contract price as the Federal-State inspection made at shipping point on July 20 showed the melons graded U.S. No. 1; respondents contended that the melons were not in suitable shipping condition and that the poor quality upon arrival warranted respondents' refusal to pay the contract price to complainant.

The certificate of inspection made by the Railroad Perishable Inspection Agency at Nanty Glo, Pa. at 10:00 A.M. July 27, stated: "Stock shows poor to good, mostly poor to fair quality. Mostly well shaped, a few misshapen. Fairly firm to firm. Practically all melons are disfigured by anthracnose lesions. Disease ranges from earlier shallow pitted stages, to advance stage. A few melons are lightly spotted. On most melons enough of surface is affected seriously to damage appearance. Interspersed melons, sound to outside appearance (except for anthracnose), when cut show flesh disintegrated, sour. Load checked out 278 melons spotted by anthracnose, accepted by consignee, 26 melons bruised, 37 cracked, 275 decayed rejected, exclusive of 623 melons unloaded before inspection could be made".

Rulings included in Decision

1. Respondents, having accepted the shipment, became liable for payment of the full purchase price unless the facts established were sufficient to come within the provisions of section 69 of the Uniform Sales Act, which provides, in part, that where there is a breach of warranty by the seller, the buyer may accept the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price.

2. The melons were not in suitable shipping condition and respondents were entitled to such damages as resulted from complainant's breach of warranty. The shipment showed a loss of approximately 25% on arrival at destination due to deterioration attributable to anthracnose, which is a serious disease of the vines and fruits in the field, develops in transit but is not always detectible at loading time. The cost per melon was fixed at 23.54¢, figures on the basis of 1324 melson for a total cost of $311.70. Complainant was awarded $140 less $79.57 (the loss on 338 melons at 23.54¢ each), or $60.43.

S-1382, Sept. 23, 1936, Docket 2154: (S.P.)

HERBERT CAMPBELL CO., HASTINGS, NEBRASKA v. ATLANTA WHOLESALE GROCER CO., ATLANTA, TEXAS.

Violation charged: Unjustified rejection of two carloads of seed potatoes.
Principal point involved: Meeting of minds essential to contract.
Order: Complaint and countercomplaint dismissed.

Outline of Facts

On December 17, 1934, a broker ordered for respondent from complainant two cars of "Nebr Triumphs Non-Certified Seed Non-irrigated $2.10 shipment January buyers option". On the same day the complainant sent the following telegram: "Confirm Atlanta two cars Camel Nebraska Triumphs Non-Certified Seed will not grade less than 85% U.S. No. 1 $2.10 stop Understand no Nebraska dryland this stock slightly irrigated regular quality Camel Pack demand very active have booked over twenty today". Complainant claimed that the potatoes in the first car shipped graded 87% U.S. No. 1 and those in the second car, 89% U.S. No. 1, and sought

an award for $230, which was claimed to be the total loss sustained after resale of the potatoes in the two cars following rejection by respondent. Respondent claimed that the potatoes did not conform to the specifications of sale and that a loss of 30¢ per bag on 720 bags, or a total of $216, was suffered, and asked for reparation in that amount.

There was no meeting of minds between the parties and no contract. The telegrams quoted show that the respondent wanted potatoes which were grown on non-irrigated land and complainant failed to agree to this material specification. The complaint and the countercomplaint were dismissed.

S-1387, Sept. 29, 1936, Docket 2176: (S.P.)

EDGERTON & BEERS, INC., WASHINGTON, D.C. v. DINO FRUIT & PRODUCE CO., INC., PROVIDENCE, R.I.

Violation charged: Unjustified rejection of a carload of watermelons.
Principal point involved: Lack of proof of good delivery in delivered sale.
Order: Complaint dismissed.

Outline of Facts

On June 14, 1935, through a broker, complainant sold to respondent one carload of U.S. No. 1 watermelons at the agreed price of $340 delivered Providence, R.I., which car was then rolling, having been shipped from Barwick, Ga. on June 11, 1935. Upon arrival of the shipment at Providence on or about July 17, it was rejected by respondent for the alleged reason that the melons did not arrive "in good marketable manner". Complainant made resale for the net sum of $25.17 and sought an award for the amount of the difference between the sum for which the watermelons were sold to respondent and the sum realized by complainant upon the resale, being $67.30.

Ruling included in Decision

Complainant failed to show that respondent's rejection was without reasonable cause. It was incumbent upon complainant to show conclusively by including in the record a copy of a destination inspection certificate or testimony of a competent disinterested person who examined the shipment showing that U.S. No. 1 Watson watermelons were delivered to respondent. The watermelons were of U.S. No. 1 grade and otherwise conformed to the specifications of the contract of sale at the time of shipment on or about June 11, but the record failed to contain satisfactory proof that the shipment met contract requirements of that grade on arrival at destination approximately a week later. Complainant in failing to establish this fact did not overcome the burden of making a prima facie case and the complaint was therefore dismissed.

S-1388, Sept. 30, 1936, Docket 2254: (S.P.)

MOJONNIER & SONS, INC., WALLA WALLA, WASHINGTON v. SAMUEL VISSE & CO., INC. CHICAGO, ILLINOIS.

Violation charged: Unjustified rejection of a carload of apples.
Principal point involved: Lack of proof that purchaser was respondent's agent.
Order: Complaint dismissed.

Outline of Facts

On or about December 5, 1935, one Charles King inspected and orally agreed to accept from complainant approximately one-half car Extra Fancy Rome Beauty apples at the agreed price of $1.15 per box f.o.b. Wenatchee, Washington, and approximately one-half carload of Fancy grade apples at the agreed price of $1.10 per box f.o.b. Wenatchee, Washington. King thereafter made and executed a purported "confirmation of sale" in writing and delivered a copy thereof to complainant, wherein it was stated that the sale was made "f.o.b.", terms "draft B.L." and showed a special agreement "shipping point acceptance final, on approval of inspection by buyer's agent Chas. King". The apples were inspected by a Federal inspector at Wenatchee on December 10 and certified to grade Washington Extra Fancy and Fancy as marked. The car was shipped to Chicago, Illinois but upon arrival on or about December 20, respondent rejected the shipment. Complainant made resale of the apples and sought an award for $277.30 for alleged loss and damages.

Respondent denied having received a copy of the confirmation of sale and alleged that Charles King was not authorized to make the purchase for it.

Ruling included in Decision

It was clear that respondent had not specifically authorized King to purchase the apples in question and the evidence was insufficient to establish that Charles King was the general buying agent of respondent and had authority to purchase, inspect and accept said apples for and on behalf of respondent and as respondent's agent. Prior purchases made by King which were accepted by respondent may have been separately and specifically authorized or may have been accepted by respondent after its own inspection at destination. The evidence not only failed to show a general agency but also failed to show that King had in the past purchased for respondent on the basis of "shipping point acceptance final". The complaint was therefore dismissed.

S-1394, Oct. 10, 1936, Docket 1780: (S.P.)

J.T. RICHARDS CO., INC. WASHINGTON, D.C. v. E.G. DARROHN, SCOTTSVILLE, N.Y.

Violation charged: Failure to deliver a carload of cabbage.
Principal point involved: In establishing measure of damages the market price at time of default must be shown.
Order: Case dismissed.

Outline of Facts

On February 2, 1935, through a broker, complainant purchased from respondent a carload of cabbage at $1 per 80-lb. bag delivered in Washington, D.C., for shipment that day from Scottsville, N.Y. By direction of the complainant it was not shipped until February 4, and it arrived in Washington, D.C. on or about February 6 and was rejected by complainant on or about February 9, on which date it was inspected by a Federal inspector and a large portion was found frozen. Complainant on February 13 purchased 300 80-lb. bags at $1.40 per bag in replacement and sought an award of $120, the difference between the purchase price and the cost of replacement.

Respondent claimed that the cabbage was in perfect condition when loaded on February 1 and was ready for shipment on February 2, but that, as a result of the two-day delay occasioned by complainant's instructions to ship on February 4, it ran into "some cold weather causing some freezing". In his deposition, respondent stated that it was sold for $50 more than the invoice price to complainant. Two other depositions were submitted to the effect that the weather was mild at the time the cabbage was loaded and shipped and none of it was in a frozen condition at the time of loading or shipment.

Rulings included in Decision

1. The cabbage was not frozen at the time it was to have been shipped on February 2, at which time the weather was mild.

2. A showing of market price value as of February 13 was not a showing of market price as of the date of respondent's default February 6, assuming the respondent was in default, the load having been purchased on a delivered price basis. This conclusion was especially justified in view of the evidence that between February 6 and February 13 the market advanced. The complaint was therefore dismissed.

S-1398, Oct. 13, 1936, Docket 1907: (Hearing)

THOMAS M. RINI, INC., CLEVELAND, OHIO v. C.H. RUNCIMAN, LOWELL, MICHIGAN.

Violation charged: Failure to ship 5 carloads of onions in compliance with contract.
Principal points involved: Speculative damages not allowable; bills of lading or delivery carrier's check-out not submitted to prove shortage.
Order: Complaint dismissed.

Outline of Facts

On or about September 8, 1934, complainant purchased from respondent 10 cars of U.S. No. 1 yellow onions, 60% 2 in. or larger, balance 1½ to 2 in., firm clean stock, at 65¢ per 50-lb. bag f.o.b. shipping point. Ten carloads were shipped, five of which were accepted as complying with contract requirements and although the other five were accepted and paid for by complainant it was contended that these five failed to comply with contract requirements in that they were not clean onions and two carloads failed to contain the full number of bags called for in the invoice by reason of which complainant claimed to have been damaged in the sum of $680.11 because of the first and $55.11 because of the second breach.

Respondent contended a totaling of the ten carloads proved that around 75% instead of 60% of the onions were 2 in. in size or over and that complainant received better onions than the contract called for.

Certificates of Federal inspection showed that all five cars graded U.S. No. 1 at shipping point; that the onions contained in each car were mature, firm, well-shaped and dry; that the onions in one car were certified as clean, in three cars as generally clean and in one car as mostly clean; that the onions in one car averaged "approximately 55% by weight 2 inches or larger"; in 2 cars, "approximately 60% by weight 2 inches or larger"; in one car "approximately 70% by weight two inches or larger", and in one car "in most sacks ranging from 1½ to 3, averaging approximately 75% by weight, 2 inches or larger in diameter. In a few sacks noted in the doorway, ranging from 1½ to 2½, averaging approximately 35%, by weight, 2 inches or larger in diameter".

Rulings included in Decision

1. So far as quality and condition were concerned, the certificates of Federal inspection clearly showed that the complainant shipped onions which were in substantial compliance with the terms of the contract. The onions in two cars failed to average 60% 2 inches or larger and in this respect respondent failed to make delivery as required by the terms of the contract.

2. The damages claimed by complainant for failure to deliver in accordance with contract requirements were purely speculative since complainant admitted that these two carloads were in storage when the complaint was filed and the record contained no proof supporting complainant's contentions that a loss was sustained as a result of the failure of these two carloads to meet contract specifications. Complainant likewise failed to support its claim that there was a shortage in that the record did not include bills of lading or delivery carrier's check-out for any of the shipments upon which a shortage was claimed. The complaint was therefore dismissed.

S-1400, Oct. 13, 1936, Docket 1951: (S.P.)

WARLEY FRUIT & PRODUCE CO., MOBILE, ALABAMA v. BEARMAN FRUIT CO. MINNEAPOLIS, MINN.

Violation charged: Unjustified rejection of a carload of cabbage.
Principal point involved: An average of 55% by weight affected by slimy decay at destination indicates cabbage was not in suitable shipping condition.
Order: Complaint dismissed.

Outline of Facts

On or about May 14, 1935, through a broker, complainant sold to respondent a carload of cabbage described in the memorandum of sale as "One Car 285 Lacrts USone Medium Copenhagen Cabbage, $1.00 crt. f.o.b., Top Ice Extra". Shipment was made from Kearns Siding, Alabama to respondent at Minneapolis, Minn., but the load was rejected by respondent. Complainant sought an award of $320 damages because of respondent's rejection.

Respondent contended that the memorandum of sale was incorrect and that the cabbage was to grade U.S. No. 1 when tendered at Minneapolis.

Federal-State inspection at Kearns Siding, Alabama on May 13, 1935 showed the cabbage to be U.S. No. 1, medium size, "Stock is fairly firm to hard, mostly firm, trimmed to 1 to 4 wrapper leaves. Outer leaves fresh and green. Grade defects average within tolerance. Less than 1% decay". State inspection on May 20 at Minneapolis showed the stock failed to grade U.S. No. 1 only on account of decay in excess of tolerance, approximately 55% by weight showing slimy decay, affecting from 2 to 4 outer leaves. This inspector certified that the bunkers were about one-fifth full of ice and that the temperature was 44° F. at the bottom of the car near the door and 46° F. at the top.

Rulings included in Decision

1. Respondent's proof of the claimed oral contract of purchase was insufficient to overcome the convincing force of the exchange of wires, the broker's memorandum of sale and related facts and circumstances indicated by the record. The broker's memorandum of sale accurately reflected the agreement of the parties as indicated by the exchange of wires between the Mobile, Alabama and the Minneapolis, Minnesota offices of the broker . No understanding that the cabbage was to be U.S. No. 1 was indicated by them. While the parties could have contracted on the basis of the price f.o.b. shipping point, the seller guaranteeing against such deterioration in transit as would cause a difference in grade at destination, such an agreement would not be the usual manner of purchase. It was admitted that the freight charges were to have been paid by respondent. Freight charges are generally paid by the owner of the commodity such as an f.o.b. purchaser.

2. Respondent's refusal to accept the shipment was not a rejection without reasonable cause. If the cabbage had been in suitable shipping condition at the time of loading "an average of approximately 55% by weight" of the cabbage would not have been affected by slimy decay as shown by the destination certificate dated May 20. The record indicated that the shipment moved from loading point to destination under normal transportation service. It was in transit only 4 days. The complaint was therefore dismissed.

S-1403, October 14, 1936, Docket 2194: (S.P.)

CHESTER FRANZELL & CO., PITTSBURGH, PA. v. A.B. COHEN COMPANY and GEORGE H. STONE & SONS, FORT FAIRFIELD, MAINE

Violation charged: Failure truly and correctly to account.

Principal points involved: Withholding of valuable information by commission merchant to owner's detriment invalidates commission charges; factor liable for want of exercise of reasonable care and diligence.

Order: Complaint dismissed as to A.B.Cohen Co.; complainant awarded $152.55 against George H.Stone & Sons.

Outline of Facts

This complaint alleged that during May, 1935 respondents consigned to complainant to be sold on respondents' behalf 9 carloads of potatoes; that complainant paid the freight charges at Pittsburgh, Pa. and other necessary expenses, such disbursements exceeding the total gross receipts received from the sale of the potatoes by $345.76, for which amount complainant requested an award.

Respondents charged complainant with gross negligence and inattention to duty through selling the potatoes at prices lower than the established market prices at Pittsburgh and thereby incurring for respondents a substantial loss on the sales, and abandonment of the last three consigned cars to the railroad for transportation charges.

The decision in this case quoted various communications between complainant and A.B. Cohen Co. as taken from the record, which showed the facts to be: During the month of May A.B.Cohen Co., as agent for George H. Stone & Sons, consigned to complainant in interstate commerce for resale on the Pittsburgh market a total of 12 carloads of Maine Green Mountain potatoes, shipments being made from May 2 to 12, both dates inclusive. The first shipments arrived on or about May 6 and succeeding shipments continued arriving about four days following the date of shipment and on May 16 complainant held on track 7 carloads which complainant had been unable to sell during preceding days. During the period May 9 to 16 complainant failed to report to either respondent the true facts concerning the unfavorable conditions of the Pittsburgh market and inability to make sales. Complainant accounted to respondents concerning the sale of 9 carloads, in which several accounts sales complainant made charges as commissions in the total amount of $193.21.

Rulings included in Decision

1. A.B. Cohen Co. simply acted as the selling agent of George H. Stone & Sons and the complaint against the Cohen Company was therefore dismissed.

2. The Secretary said the general rule is that a factor or commission merchant must not only act in good faith in connection with the handling and sale of the goods of his principal but is also bound to use reasonable or ordinary care, diligence and prudence and is liable for want of its exercise in the handling and sale of the goods of his principal. The factor must exercise that degree of care and judgment that a prudent business man would exercise in the management of his own affairs under the same or similar circumstances.

3. Due to complainant's failure to keep respondents fully advised as to its failure to make sale of the potatoes, complainant failed to perform services as a commission merchant of the value stated in the accounts sales, or any value whatsoever. The failure to make frequent or daily reports amounted to the withholding of valuable information. If respondents had received daily reports as to the true market conditions at Pittsburgh diversion might have been made to more favorable markets or they might have made other disposition of the cars and might have escaped in part accumulating demurrage costs and the constantly lessening value of the potatoes due to natural deterioration. A failure to perform its full duty in these particulars warranted the conclusion that complainant did not earn the commissions which were part of the claim. Reparation in complainant's favor against George H. Stone & Sons was therefore limited to the difference between the $345.76 claimed and the commissions of $193.21, or $152.55, representing freight, demurrage and terminal charges, for which amount, plus interest, an award was ordered.

S-1405, October 20, 1936, Docket 2082: (S.P.)

J.L. RUSSILL CO., SACRAMENTO, CALIF. v. PALMER FRUIT CO., SIOUX CITY, IOWA.

Violation charged: Failure to account for a carload of peaches.
Principal point involved: Without tender by complainant there could be no responsibility by respondent to pay purchase price.
Order: Complaint dismissed.

Outline of Facts

In the month of August, 1935, through a broker, complainant sold to respondent one carload, 1211 boxes, of Elberta peaches warranted as 85% grade U.S. No. 1 "or better" at the agreed price of 55¢ per box f.o.b. Red Bluff, California, or a total of $666.05. On August 16, while the load was in tranist, the broker wired complainant "CONFIDENTIALLY PERSUADED PALMER RELINQUISH PFE-28378 ENABLE YOU APPLY MARSHALL ORDER THEREFORE YOU WIRE US TO THIS EFFECT AND YOU ATTEND REDIVERSION ADVISE". Complainant answered by wire the same day "HAVE PERSUADED ONE OUR CUSTOMERS RELEASE CAR ELBERTAS WHICH WE HAD SOLD TO THEM ALLOW US APPLY ON MARSHALL ORDER IF SATISFACTORY MARSHALL STOP CAR GRADES 85% U S #1 SHIPPED 11TH LINDALL***WIRE IMMEDIATELY WHETHER SATISFACTORY MARSHALL PLACE ON THEIR ORDER PFE 28378". On August 18 the broker wired complainant "YESTERDAY PERSUADED MARSHALL ACCEPT PALMERS CAR ON HIS ELBERTA ORDER BASIS INSPECTION SIOUX CITY HOWEVER INSPECTED FIND 10% to 15% DECAY ALSO ONE END SHIFTED MARSHALL CANNOT USE SUGGEST YOU DIVERT QUICK LARGER MARKET **". After the Marshall Fruit Co. refused to accept the shipment upon its order complainant made resale to another purchaser.

Respondent's position was that while the car was in transit the respondent relinquished the load to the complainant for delivery to another purchaser and that the respondent therefore never secured possession of the peaches in question. Complainant contended that the broker acted entirely on his own initiative and responsibility and without taking the matter up with complainant, and sought an award for $653.07 for loss and damages sustained.

Ruling included in Decision

Complainant's tender of the load to respondent was not complete. The wires quoted indicate that even though the broker apparently suggested the substitution, complainant, by its wire of August 16, approved and confirmed the broker's action. The car was consigned to complainant and while in transit was diverted by complainant to the Marshall Fruit Co. The effect of such action was to give complainant control and possession of the load. Without a tender by the complainant there could be no obligation on the part of the respondent to pay the purchase price. The complaint was therefore dismissed.

S-1406, Oct. 20, 1936, Docket 2036: (Hearing)

J & G LIPPMANN, NEW YORK, N.Y. v. ANDREWS BROS. OF DETROIT, INC., DETROIT, MICHIGAN.

Violation charged: Unjustified rejection of two carloads of onions.
Principal points involved: In f.o.b. sale proper and prompt billing by shipper is presumed part of contract; insufficient proof of damages.
Order: Complaint and countercomplaint dismissed.

Outline of Facts

On or about June 6, 1935, through a broker, complainant sold to respondent five cars of U.S. No. 1 onions at $1.50 per 50-lb. sack f.o.b. Farmersville, Texas. Thereafter, while in transit, complainant diverted two cars to itself at Detroit, Michigan. Complainant claimed that delivery was to be made upon payment of drafts in the amount of the purchase price but that respondent refused to pay the drafts and rejected the shipments; that complainant thereafter made resale, but on account of respondent's rejection suffered loss and was damaged in the sum of $947.71, for which amount reparation was requested.

Respondent's defense was on the ground that the shipments were expected to arrive at Detroit in time for the June 11 market and that the rolling loads were sold to a Detroit concern at $2.10 per bag to be delivered not later than 3 a.m. June 12; that one car arrived at 7:45 a.m. June 11 and the other at 2:20 a.m. June 12, both consigned to complainant; that respondent was not informed where the drafts had been sent and therefore could not make payment of the purchase price and obtain possession; that on June 11 respondent wired the broker "unless can get immediate release both cars onions will refuse, billed shipper" and on June 12 that respondent had been unable to obtain delivery and the broker could make other disposition. Respondent demanded judgment against complainant on its counterclaim based upon loss of resale profits in the sum of $117.30.

The record disclosed that on June 10 respondent received a broker's standard memorandum of sale signed by the broker on June 8 specifying the sale of two carloads of U.S. No. 1 wax onions at the f.o.b. price of $1.50 per sack, both cars to be shipped June 7, to complainant, Detroit, Mich., "advise Andrews Bros. Inc." and further providing for payment by "sight draft against delivery order". After confirming its sale to the Detroit concern, respondent began tracing the two cars and found both cars had arrived at destination but that they had been billed to complainant without any mention of respondent.

Rulings included in Decision

1. Complainant not only negligently failed to promptly bill the shipments with delivery orders attached, thus failing to make them readily available to respondent at destination, but also failed to present proof in support of its alleged loss. Complainant's contention that the contract was fully complied with upon delivery to the carrier within the time provided under the contract was untenable since mere physical delivery of produce to the carrier is not sufficient under an f.o.b. contract. Proper and prompt billing by the shipper is also presumed to be a part of the contract of sale. Respondent tried diligently to secure possession of at least one car by communicating with complainant and even went to the extent of depositing $2000 with the carrier for its protection but, still being unable to get delivery, rejected the shipments when complainant finally corrected its error and made it possible for respondent to get possession of the cars. The complaint was therefore dismissed.

2. The record contained no supporting proof of the sale by respondent to the Detroit concern and the counter complaint was therefore dismissed.

S-1408, October 20, 1936, Docket 2084: (S.P.)

THE S.A. GERRARD CO., CINCINNATI, OHIO v. E.Y. FOLEY, FRESNO, CALIF. and PIONEER FRUIT & COMMISSION CO., HARTFORD, CONN.

Violation charged: Unjustified rejection of a carload of plums.
Principal point involved: Failure to establish contract necessitates dismissal.
Order: Complaint dismissed.

Outline of Facts

On or about July 11, 1935, complainant negotiated with E.Y. Foley for the sale of one carload of "Duertas" plums, grade U.S. No. 1, for shipment from Newcastle, Calif. "the first part of the week of July 15, 1935" at the agreed price of $1275.23. After Federal inspection at Newcastle on July 15 they were certified as U.S. No. 1. Thereafter complainant shipped to itself in interstate commerce 1036 boxes of plums for subsequent diversion according to directions of E.Y. Foley, Foley to pay the purchase price by taking up the draft drawn by complainant.

Foley failed to pay the purchase price and take possession of the rolling car and complainant thereafter diverted it from Chicago, Illinois to New York City where the load was sold at auction for a net return of $806.72. The complaint was brought against Foley as principal or as agent for Pioneer Fruit & Commission Co., and complainant sought to recover alleged loss and damage in the sum of $468.96.

Pioneer Fruit & Commission Co. claimed the plums were not ordered from complainant and that "the transaction was one between ourselves and Mr. E.Y. Foley, of Fresno, Calif." Foley's answer was very brief and indefinite and did not disclose whether he claimed to have acted as principal or agent. There was no proof of sale from complainant to Foley except the statement of two witnesses to the effect that complainant's wire offer to Foley dated July 11 was accepted by Foley "on the first of the following week" and Foley's wire to Pioneer Fruit & Commission Co. on July 16 that one car of "Duartes" was "out yesterday Newcastle" and that "other car out today".

Rulings included in Decision

1. The record as a whole and particularly the wires quoted and referred to in the decision clearly showed that as against respondent Pioneer Fruit & Commission Co. there was no evidence establishing a sale of the plums by complainant to said respondent at the prices and upon the terms and conditions set out in the complaint.

2. The evidence failed to establish that E.Y. Foley made the purchase of the plums as agent for Pioneer Fruit & Commission Co. It appeared that while Foley was negotiating the sale of the plums in question to the Pioneer Fruit & Commission Co. he was also negotiating a purchase thereof from complainant. There was nothing in the record to indicate that complainant had any knowledge of the efforts of Pioneer Fruit & Commission Co. to secure the lot in question prior to July 19 and nothing to indicate that the Pioneer Fruit & Commission Co. had any information that complainant was the shipper of the load.

3. It was unnecessary to determine whether as between complainant and respondent Foley the contract was consummated and the rights and obligations of the parties should be determined according to the laws of the States of California and New York. The statutes of both States require that where a sale of goods is made in excess of stated value such sale "shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive

the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent in that behalf". The evidence failed to show that any note or memorandum of purchase and sale agreement entered into by and between complainant and E.Y. Foley was made as required by the Statute of Frauds. The complaint was therefore dismissed.

S-1415, Nov. 13, 1936, Docket 2110: (S.P.)

C.A. JOHNSON, ONECO, FLORIDA v. GEORGE I. NEALLY, LAKELAND, FLA.

Violation charged: Failure to account.
Principal points involved: Lack of proof of purchase for shipment in interstate commerce or that buyer was respondent's agent.
Order: Complaint dismissed.

Outline of Facts

During January and February, 1935, complainant sold to George Andrews 642 field crates of grapefruit at 40¢ per crate and 68 field crates of oranges at 60¢ percrate, payment to be made "run-of-the-tree on delivery" to George Andrews. Complainant alleged that George Andrews acted as agent for respondent; that upon arrival of the fruit at respondent's packing house it was accepted "in compliance with said verbal contract of sale", but respondent failed, neglected and refused to pay complainant a balance of $97.60, for which complainant sought an award.

Respondent alleged he advanced money to one Fred Sloan to be used in purchasing citrus fruit but denied that Andrews was respondent's agent; alleged that the first knowledge respondent had of sale of fruit by complainant to Andrews or Sloan was when Sloan drew a draft on respondent in favor of complainant, whereupon respondent immediately notified complainant Sloan had no authority to draw any such draft; that complainant did not make any inquiry of respondent as to the authority of Andrews until after selling and delivering the fruit, at which time respondent fully advised complainant that Andrews was not his agent and gave him ample opportunity to take action against Andrews for the protection of his interests.

Ruling included in Decision

Complainant failed to show that any part of the fruit in controversy was purchased for shipment in interstate commerce and the complaint was therefore ordered dismissed. Complainant also failed to prove that George Andrews was the agent of respondent or that, although the fruit was delivered to the packing house operated by Fred Sloan and shipments thereafter made in respondent's name, respondent was in fact the actual purchaser from complainant.

S-1420, December 4, 1936, Docket 2027: (Hearing)

MUSANTE-GILLARDE-WILLIAMS, INC., SALINAS, CALIF. v. SAM GOLDSTINE & CO., INC., DETROIT, MICHIGAN.

Violation charged: Failure to account for a portion of the purchase price of five carloads of lettuce.
Principal points involved: Insufficient proof by complainant of breach of contract; insufficient proof by respondent of damages sustained.
Order: Complaint dismissed; countercomplaint dismissed.

Outline of Facts

During the second week of April, 1935 complainant and respondent, through an exchange of several telegrams and letters, entered into an agreement whereby complainant was to sell and respondent to buy outstanding, good quality, solid, bright green lettuce at the prevailing f.o.b. market price. Complainant thereafter purchased approximately forty carloads of lettuce in California, billed respondent for the f.o.b. price plus brokerage on each car at the time of shipment, and shipped these cars from loading points in the State of California to respondent at Detroit, Michigan. Respondent accepted all these shipments and mailed checks for the purchase price of most of them before arrival, but complained of the quality and condition of many of them at the time, or very soon after, they reached destination. A portion of this lettuce was turned over by respondent to a member of the complainant firm, who sold the lettuce, and so far as the records disclosed turned over to complainant all proceeds realized on the sale of these shipments so handled by him, and, in addition to this, turned over to complainant $1250 which had been advanced by respondent before it was definitely known what the deficit would be on these shipments.

Complainant sought to recover $817.40 alleged to be due from respondent on five cars of lettuce purchased for respondent early in May, 1935, plus $12.91 expenses alleged to have been incurred in an effort to collect this balance. Respondent denied owing complainant anything and contended that some of the shipments were purchased from shippers with whom complainant was financially interested and from whom complainant received a profit and a brokerage in addition to the brokerage charged to the respondent without the knowledge and consent of respondent, and by its countercomplaint sought to recover alleged loss of $5068.93 on the shipments upon which the complaint was based and seventeen other cars shipped by complainant, none of which shipments, it was contended, contained lettuce of the kind, quality and grade specified in the contract between the parties. In support of its contentions, complainant submitted several depositions.

Rulings included in Decision

1. Complainant failed to sustain the burden of proving that the kind, quality and grade of lettuce called for in the contract of sale was shipped to respondent. The exchange of telegrams referred to in the decision indicated quite conclusively that respondent ordered what can at least be termed good quality lettuce and complainant so understood the order. Despite the fact that the burden of proving that the kind, quality and grade of lettuce specified in the contract was shipped to respondent rested upon the complainant, complainant submitted no official copies of shipping point inspection certificates but relied entirely upon testimony of persons more or less interested in the transactions. The complaint was therefore dismissed.

2. Respondent accepted all the shipments here in controversy under protest, but failed to prove the extent of the damage sustained or that double brokerage was charged by complainant. The countercomplaint was therefore dismissed.

S-1441, Dec. 17, 1936, Docket 1774: (S.P.)

FRANK NARUTO & CO., LTD., LOS ANGELES, CALIF. v. PIOWATY BROS., INC. CHICAGO, ILLINOIS.

Violation charged: Unjustified rejection of a carload of green beans which was to be handled on joint account.
Principal points involved: The beans were not of the specified variety; insufficient evidence that they were similar to those shipped in December 1932.
Order: Case dismissed.

Outline of Facts

As the result of several telegrams exchanged on November 13 and 14, 1934, complainant and respondent entered into a contract whereby complainant was to ship and respondent to handle on joint account a carload of Canadian Wonder beans similar to those shipped by complainant to respondent during December, 1932. On or about November 14, 1934, complainant shipped from California to respondent at Chicago, Illinois a carload, 651 hampers, of Kentucky Wonder beans invoiced by complainant to respondent at $1.60 per hamper, or $1041.60 for the carload, one-half of which, or $520.80, was charged to respondent under the joint account agreement. Respondent promptly rejected the shipment upon arrival at destination because complainant did not ship Canadian Wonder beans similar to those shipped by complainant during December, 1932 but instead shipped a variety and type which were in poor demand in Chicago, and the shipment was thereafter sold for the account of complainant for the net sum of $129.13, or $912.47 less than the price at which the parties agreed to handle a carload of Canadian Wonder beans on joint account, and it was one-half of this loss, or $456.24 which complainant sought to recover.

Certificate of Federal-State inspection issued Nov. 14 showed that the shipment was packed in hampers labeled "Tasterite Brand" and graded U.S. No. 1. Federal inspection on November 22 showed that the hampers were labeled "Kentucky Wonder beans" and the stock then failed to grade U.S. No. 1 only on account of russeting.

Ruling included in Decision

Complainant failed to prove that it shipped the variety and type of beans specified in the agreement entered into by the parties and respondent's rejection could not be found to have been without reasonable cause. In previous cases it has been held that where an agreement is reached through an exchange of telegrams or letters and the parties later disagree with reference to some of the terms of the contract which was thus entered into, consideration must be given to the language used in all the communications in arriving at a conclusion with reference to the terms of the contract actually entered into. In the instant case complainant offered "Canadian Wonders similar shipped you December 1932" and the record showed that respondent relied upon that description in accepting complainant's offer. It was equally clear from the evidence that respondent did not receive Canadian Wonder beans and no attempt was made by complainant to show that the beans here in controversy were "similar shipped you December 1932". The complaint was therefore dismissed.

S-1442, December 17, 1936, Docket 2165: (S.P.)

J.R. PAXTON, MERCEDES, TEXAS v. THE CASTELLINI CO., CINCINNATI, OHIO.

Violation charged: Unjustified rejection of a carload of onions.
Principal point involved: Development of 4% Bacterial Soft Rot and Macrosporium Rot in 4 days indicative of lack of suitable shipping condition in shipment handled under normal transportation service.
Order: Case dismissed.

Outline of Facts

In the month of May, 1935, complainant sold to respondent one carload of Yellow Bermuda onions warranted as U.S. No. 1 at the agreed price of $2 per 50-lb sack, f.o.b. Laredo, Texas. On May 6 complainant diverted a carload shipped on the 5th to respondent but upon arrival at Cincinnati, Ohio on May 10, respondent refused to accept it for the alleged reason that the onions did not comply with contract specifications and complainant made resale to another purchaser for a net return of $553.70 and sought an award for $466.30, the alleged loss and damage suffered.

Shipping point inspection certificate showed the onions graded U.S. No. 1, "stock generally mature, fairly well cured, clean to fairly clean, bright to fairly bright; no decay; grade defects within tolerance". Federal destination inspection made on May 10 showed the stock failed to grade U.S. No. 1 only on account of decay, Bacterial Soft Rot and Macrosporium Rot, generally in early stages, occurring in most sacks and ranging from 1%, by weight, in some to 6% in others and averaging approximately 4% for the load.

Ruling included in Decision

Respondent's refusal to accept the shipment did not amount to a rejection thereof without reasonable cause. The Macrosporium rot found at destination is of field origin. The bill of lading called for standard ventilation. There was nothing in the record to indicate but that the shipment was given normal transportation service. Standard rules and definitions of trade terms adopted by the fruit and vegetable industry which were printed on the back of the broker's standard memorandum of sale provide that

"suitable shipping condition" in connection with f.o.b. sales of rolling carloads shall be deemed to mean that the commodity at the time of sale shall be in condition which, "when shipment is handled under normal transportation service and condition, will assure delivery without abnormal deterioration at the destination specified in contract of sale". The record indicated that if the onions had been in suitable shipping condition on the date of sale the load should have arrived at destination, four days later, with very little decay. An average of 4% decay was abnormal. The case was therefore dismissed.

S-1448, Dec. 22, 1936, Docket 2104: (S.P.)

ZILLEL FRUIT CO., ROCK ISLAND, ILL. v. L.S. KEARNS, THIBODAUX, LA.

Violation charged: Failure to deliver a carload of sweet potatoes in accordance with contract specifications.
Principal point involved: Insufficient proof of damages by not showing market value of inferior stock at time of breach of warranty by seller.
Order: Complaint dismissed.

Outline of Facts

On or about January 22, 1935, complainant purchased from respondent one carload of sweetpotatoes, 500 crates, warranted as Grade U.S. No. 1, carefully selected, dry cured, and hand graded, at the agreed price of 90¢ per crate f.o.b. Laurel, Miss. The car was shipped to complainant at Rock Island, Illinois arriving on or about January 31, and on the afternoon of that day complainant applied for and secured Federal inspection of samples taken from the balance of the load left in the car. The sweetpotatoes were then certified as failing to grade U.S. No. 1 on account of grade defects, averaging 12%, consisting principally of large growth cracks, Black Rot and badly misshapen stock, some weevil injury, and undersized stock in excess of respective tolerances, the size "Generally ranging from 1½ to 3½ inches, with an average of 6% by weight under 1¾ inches and 2% over 3½ inches in diameter. Ranging from 2 to 9 inches, mostly 4 to 7 inches in length. Stock less than 3 inches in length being over 2 inches in diameter". Complainant accepted the shipment and made resale thereof to different purchasers during the period January 30 to and including March 23, 1935, realizing net returns of $440.65. Complainant sought an award for a claimed loss of $206.75, being the difference between the f.o.b. loading point price of $450, plus freight charges and cost of Federal inspection, less the net resale returns of $440.65.

Attached to the complaint were exhibits establishing the purchase and sale agreement of the parties, payment of the purchase price and bill of lading, original Federal inspection certificate based on inspection of the load at Rock Island, Ill. on January 31, 1935. Complaint was served on respondent who was notified to file an answer but failed to do so and was therefore in default.

Rulings included in Decision

1. The sweetpotatoes furnished by respondent did not conform to respondent's warranty. It did not appear that the load was Federally inspected at shipping point, but the destination inspector found that "an average of 6% by weight" were "under 1¾ inches and 2% over 3½ inches in diameter". Federal grading standards for U.S. No. 1 sweetpotatoes provide that the "diameter of each sweetpotato shall not be less than 1¾ inches, nor more than 3½ inches, and the length shall be not less than 3 inches, nor more than 10 inches, but the length may be less than 3 inches if the diameter is 2 inches or more". The inspector also found "an average of 12% grade defects, consisting principally of large growth cracks, Black Rot, and badly misshapen stock" and "some weevil injury". These were defects that existed at the time of loading. The information shown in the destination inspection certificate was the only definite evidence as to the actual size, quality, condition and grade of the stock.

2. The evidence was insufficient as a basis for a definite finding of damages as it failed to show the market value of the inferior sweetpotatoes received at or about the time of respondent's breach. Where there is a breach of warranty by the seller the buyer may keep the goods and maintain an action against the seller for damages based on the breach of warranty. The measure of damages for breach of warranty of quality is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty. Complainant listed sales made from the stock at destination to various purchasers from January 30 to March 23. The gross sales were $507.17, less $41.50, representing 121 crates returned by the purchasers from February 11 to March 30. The record failed to contrast the difference between the value of the stock as warranted at the origin point and the value of the inferior stock actually shipped. The breach of warranty occurred January 27. The contrast of values above referred to should be made as of that date. The total received by complainant from resales made over a period of two months failed to establish the value of the inferior stock as of the date of the

respondent's breach. The most favorable application of the evidence that could possibly be made was to accept resales made of 31 crates at destination on January 30 and 31. The average per crate value produced by such method was $1.64½. Applying such a unit value to the total load produced a market value for the lot at destination of $822.50. The contract price, which in the absence of better evidence may be accepted as proof of the value of the stock if it had been as warranted, plus freight charges, and cost of Federal inspection at destination, totaled $647.30. It was thus seen that if respondent had made resale of the load at the unit prices received for the first lots sold, no loss would have been sustained. In other words, notwithstanding respondent's breach of warranty, the evidence showed that the market value of the inferior stock, at or about the time of such breach, was in excess of the contract price. The complaint was therefore dismissed.

S-1449, December 22, 1936, Docket 2217: (S.P.)

THE GILBERT CO., ST. LOUIS, MO. v. SCHOENBERG-PRICE CO., CHICAGO, ILLINOIS.

Violation charged: Failure to pay a brokerage fee of $25 on purchase of a carload of prunes.
Principal point involved: Broker failed to follow instructions.
Order: Case dismissed.

Outline of Facts

On or about October 4, 1935, respondent employed complainant as its broker to purchase a carload of prunes in good firm condition. The car was diverted or shipped from St. Louis, Mo. to Chicago, Illinois. Complainant sought an award for $25 brokerage alleged to be due, but respondent claimed complainant did not follow instructions, having purchased prunes showing from 5 to 16% decay, and was therefore not entitled to a brokerage. Respondent alleged that an allowance of 5¢ per basket was made by the shipper after several days of telephoning and telegraphing, involving considerable expense, which allowance was only a small percentage of the loss incurred in handling the car.

Ruling included in Decision

Complainant failed to comply with the instructions of respondent and the claim for brokerage was therefore dismissed. The evidence disclosed that complainant was instructed by respondent to buy a carload of prunes in "good firm condition" and the prunes purchased were ripe and soft and showed decay ranging from 5 to 16%.

S-1450, December 22, 1936, Docket 2259: (S.P.)

P. BERRY AND SONS, INC., HARTFORD, CONN. v. P.E. CRAIG, PRESQUE ISLE, MAINE.

Violation charged: Failure to account for a sum in excess of the contract price which sum was charged by respondent and paid by complainant in making final payment for 2 carloads of potatoes.
Principal point involved: Breach of contract and resulting loss must be proven to recover damages.
Order: Case dismissed.

Outline of Facts

On or about October 31, 1935, complainant purchased from respondent 2 carloads of Green Mountain potatoes at the agreed price of $1.35 per cwt. delivered Middleton, Conn. The potatoes were shipped to complainant from loading point in the State of Maine and in rendering an invoice on and drawing draft in payment for one of the carloads respondent added $65.70, representing a deduction made by complainant from a remittance to respondent in payment for a carload of potatoes previously shipped by respondent to complainant during the year 1934. Complainant paid the drafts but sought to recover the sum of $65.70.

The evidence disclosed that during the calendar year 1934 the parties entered into some sort of a contract for the purchase and sale of 2 carloads of potatoes. It was the contention of complainant that one of these cars of potatoes was not shipped on the date specified in the contract of sale and that as a consequence the complainant suffered loss of $65.70, which sum was deducted from remittance made to respondent by the complainant on May 18, 1934.

Ruling included in Decision

In order to recover damages under the Act it is incumbent upon the party claiming damages to show that the actions of the other party constituted breach of contract and resulted in a loss to the complainant. The complainant presented no evidence showing the terms of the contract entered into with the respondent during the year 1934, nor in support of the alleged breach thereof by the respondent, and the deduction of $65.70 made by the complainant from the invoice price of the carload of potatoes shipped during the near 1934 was therefore unsupported by evidence. The complaint was dismissed.

S-1457, Jan. 11, 1937, Docket 2244: (S.P.)

THE S.A. GERRARD CO., CINCINNATI, OHIO v. A. RINELLA, INC., GALESBURG, ILL. and FEDERAL BROKERAGE CO., PEORIA, ILL.

Violation charged: Failure to account for a carload of lettuce.
Principal points involved: Recovery of damages dependent upon proof of violation of section 2; no contract entered into.
Order: Complaint dismissed.

Outline of Facts

On or about December 17, 1935, complainant loaded and shipped from Cowden, Arizona, a car containing 300 standard crates of lettuce and consigned the shipment to itself at St.Louis, Mo. The Federal Brokerage Co. wired complainant on December 18 that A. Rinella, Inc. wanted lettuce upon a price to be arrived at on arrival and on the same day complainant wired Federal Brokerage Co. that it was diverting the car to A. Rinella, Inc. subject to the delivery "price on arrival" of the car at Galesburg, Illinois. The shipment arrived at Galesburg December 24 and Rinella was notified by the carrier of such arrival and placement for unloading. Thereafter complainant notified the broker that the lettuce could be purchased by Rinella at a delivered price of $2.50 per crate, or for a total of $750. On December 26 the broker notified complainant that Rinella did not like the quality of the lettuce and was not interested in purchasing it at any price and the lettuce was forwarded by complainant to New York City where it was sold for a net return of $93.80. Complainant contended that respondent did not reject the lettuce until more than 24 hours after arrival of the shipment at Galesburg, the destination stated, and that thereby in legal effect respondent accepted the load even though complainant assumed physical possession of the shipment for the purpose of making resale for respondent's account in an effort to minimize the loss and asked for reparation in the sum of $330.12, less $75.33 received from the carrier as a damage claim subsequent to the filing of the complaint, which reduced complainant's net claim to $254.79.

Ruling included in Decision

1. No damages could be awarded complainant unless the evidence showed that respondent had violated some provision of section 2 in connection with the handling of the lot in question. The facts upon which complainant relied did not constitute a violation of section 2 of the Act on the part of respondent. Diversion of the load in question was made to respondent for inspection and possible purchase for a price to be fixed after arrival of the car at Galesburg, Ill. No contract of purchase or other contract, either express or arising by operation of law, was consummated following arrival of the car at destination. Hence no contractual obligation rested upon respondent to accept the load at the price fixed by complainant within 24 hours, or at any other time and the complaint was therefore dismissed.

S-1461, Jan. 15, 1937, Docket 2241: (S.P.)

GRIDLEY, MAXON & CO., INC., CHICAGO, ILL. v. JULIUS O. BERMAN, CHICAGO, ILL.

Violation charged: Unjustified rejection of two carloads of tomatoes.
Principal points involved: A contract cannot be cancelled or modified by either party without the assent of the other; respondent not liable when seller knew purchase was being made by him as agent only; complainant must prove allegations and damages.
Order: Complaint dismissed.

Outline of Facts

On or about November 7, 1935, complainant sold to respondent two carloads of tomatoes at the agreed price of $1350 for each carload f.o.b. Chicago. Complainant claimed that thereafter complainant accepted a diversion order from the respondent for "undisclosed principals" on one car and the car was diverted to respondent's customer in the State of New York, and that the other shipment was also to be diverted for respondent but he failed to disclose where to divert it; that respondent refused to accept the shipments; that following respondent's failure to accept, the second car referred to above was resold to a Chicago firm for a net of $1318; that a purchaser could not be located for the other car and complainant was "forced to sell said car through our store for respondent's account and said resale netted complainant the sum of $1285.64" and that on account of the refusal of the two shipments the complainant suffered loss and was damaged in the total sum of $96.36.

Respondent denied responsibility for the shipments, alleging he was acting merely as agent for the purchaser, and alleged that notice of cancellation of the purchase was given complainant by respondent within three hours subsequent to the purchase and it was respondent's understanding "that the practice generally in the trade is that purchaser has the right to cancel within 24 hours after time of purchase".

Rulings included in Decision

1. Respondent's alleged understanding "that the practice generally in the trade is that purchaser has the right to cancel within twenty-four hours after time of purchase" is, of course, untenable. It has frequently been held, and rightfully so, that a contract once consummated cannot be cancelled or modified by either party without assent of the other.

2. Complainant knew at the time the sale here under consideration was made that respondent was not the purchaser of the first car mentioned above. Complainant attached to its complaint as an exhibit an invoice dated November 7, 1935, indicating that this car was sold to the firm of S. Cohen & Co., N.Y.C., at $2.25 per lug, or for a total net sum of $1072.56 f.o.b. Chicago. That invoice bore the notation "inspected and accepted by J. Berman". Considering this exhibit at its face value and in the absence of any clarifying statements, it seemed reasonable to assume that the complainant must have been fully aware that this shipment was purchased by the respondent as agent for S. Cohen & Co. and that the complainant was looking to S. Cohen & Co., rather than to the respondent, for payment of the purchase price. Insofar as this shipment was concerned, the complaint was dismissed.

3. With respect to the other car, the record contained no evidence whatever to substantiate respondent's contention that it was acting as agent only. The respondent having admitted purchase of the shipments must therefore be held liable to the complainant for any loss shown to have been caused by his rejection.

4. Complainant failed to furnish proof in support of its alleged loss in connection with this car. Complainant alleged that this shipment was sold at a loss of $32 but failed to present proof in support of that allegation. Damages can not be awarded on a mere allegation or solely on sworn statements of the complainant or its employees, but must be proven by competent evidence. The burden was upon the complainant to prove all necessary features of its complaint, including proof of damages, and failing in this respect the complaint must also be dismissed as to this shipment.

S-1463, January 16, 1937, Docket 2211: (S.P.)

RUHLMAN & CO., INC., NEW YORK, N.Y. v. SPRAGALE FRUIT CO., PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of tomatoes.

Principal points involved: Whether broker was respondent's agent immaterial as memorandum of sale was signed by a member of purchasing partnership; buyer's notice that a reduction in price must be made or the seller make other disposition constituted rejection; failure of respondent to complain regarding pack was not proof of complainant's compliance with contract.

Order: Case dismissed

Outline of Facts

On or about June 17, 1935, through a broker, complainant sold to respondent one carload of U.S. No. 1 straight pack tomatoes of specified sizes and specified price per lug for each of said sizes, the aggregate purchase price being $567.10 f.o.b. Lobeco, S.C. At that time the tomatoes were in transit and thereafter were diverted to respondent at Pittsburgh, Pa. where they arrived on or about June 20. Respondent complained of the extent of decay and refused to accept the shipment except at a reduction in the purchase price and complainant made resale for a net of $304.96, and sought an award for alleged loss sustained.

Respondent denied that the broker acted as its agent and that respondent failed, neglected and refused to accept the tomatoes, stating it was the duty of the complainant to notify respondent that it would be necessary to accept the tomatoes at invoice price or they would be sold for its account, and contended that the tomatoes were not "straight pack" as specified.

Federal inspection was made at Pittsburgh on June 20 and the load was certified as U.S. No. 1, 5x6, 6x6, 6x7 and 7x7 straight and bridge packs noted, with an average of 5% decay, mostly Bacterial Soft Rot and Rhizopus Rot, a few Phoma Rot in generally advanced stage.

Rulings included in Decision

1. It seemed to be immaterial, so far as the enforceability of the purchase and sale contract in this case was concerned, whether the broker acted as agent for all parties or only as agent for complainant, since the memorandum of sale was signed by Anthony Spracale, acting for respondent.

2. Complainant had the right to treat the respondent's action as in effect a rejection of the shipment. A rejection need not follow any set form. The broker's wire of June 18 to complainant company as to "plenty decay" was accepted as an accurate statement of the reasons assigned by respondent for either a reduction in the price of 25 cents per lug or that complainant should "make other disposition".

3. The evidence failed to establish respondent's unlawful rejection of the load of tomatoes. There was no proof as to the exact extent of decay, if any, at shipping point and the average of 5% decay shown at destination was not in excess of the tolerance permitted for the grade. However, it could not be said that the burden of proof resting upon complainant had been complied with. The inspector did not indicate the number of lugs noted "bridge pack" instead of "straight pack" and there was no other evidence as to the extent to which either pack was included in the shipment. While it was true respondent made no complaint concerning inclusion of bridge pack instead of straight pack at the time a request for reduction in the price was made, but limited the complaint to the claimed presence of decay, such failure to complain did not supply affirmative proof of complainant's compliance with its "straight pack" specification. The complaint was therefore dismissed.

S-1464, Jan. 16, 1937, Docket 1909: (S.P.)

W.H. MARTIN, BANGOR, MAINE v. J. BISHOFF, NEW YORK, N.Y.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal points involved: Cause of action must be proved by positive evidence of existence of contract.
Order: Case dismissed.

Outline of Facts

Complainant claimed that on or about May 9, 1935, through William Clark, Jr., a broker acting as agent for both complainant and respondent, he sold to respondent one carload of U.S. No. 1 Green Mountain potatoes at the agreed price of 85¢ per cwt. delivered at Bronx Terminal Market, the car to contain 400 one-hundred pound sacks, for a total of $340, less freight charges of $174.87, or for a net sum of $165.13; that the potatoes were shipped from Sherman, Maine, to respondent at New York City but were rejected by respondent and that they were resold for the net price of $23.96. Complainant sought an award for $141.17, the difference between the contract price of $165.13 and the resale price of $23.96.

Respondent filed a verified answer denying each and every material allegation contained in the complaint. In support thereof he submitted the deposition of one Max H. Beck, which stated that Beck entered into a contract similar to the one alleged in the complaint, that he used the name of respondent as a credit reference, and that he was formerly associated in business with respondent. Complainant submitted a deposition of William Clark, Jr. in support of his contentions.

Rulings included in Decision

1. Complainant failed to prove a cause of action against respondent. There was no evidence which conclusively showed that respondent either personally or by an agent entered into any contract with complainant. The complainant alleged that the sale was made through William Clark,Jr. and Son, Inc., brokers. Mr. William Clark, Jr. in his deposition testimony, merely stated that the order was brought in by a salesman by the name of Kelly. Mr. Clark admitted that he does not know respondent personally, but stated that he had a telephone conversation with a man purporting to be respondent. The evidence clearly showed that he did not know and had no means of knowing the identity of the man with whom he was speaking.

2. Conflicting statements seriously affect the credibility of a witness, especially when the conflict is irreconcilable. In the deposition testimony of Mr. William Clark, Jr., there appeared two conflicting statements. He stated, in substance, that it was a couple of days before the order could be placed. He subsequently stated that he confirmed the sale by a letter dated May 9, which was the same date the purported order was alleged to have been obtained from respondent.

3. It was incumbent upon complainant to prove by positive evidence that respondent entered into the contract alleged in the complaint and failure to prove that respondent was a party to the contract precluded an award of reparation against him. The case was therefore dismissed.

S-1466, Jan. 23, 1937, Docket 2227: (S.P.)

D. McCAULEY & CO., INC. PHILADELPHIA, PA. v. JAMES C. STATLER, CRYSTAL CITY, TEXAS.

Violation charged: Failure to account for deficits incurred in the handling of several carload shipments of onions.
Principal points involved: Burden of proof on complainant and respondent to prove allegations; relationship of principal and agent shown by terms used.
Order: Complaint was dismissed. Respondent awarded $33.26 with interest.

Outline of Facts

During the month of June, 1935, complainant and respondent entered into a contract whereby respondent was to either buy or secure on consignment for the complainant certain carloads of onions, for which services complainant was to pay the respondent a brokerage or commission. During the same month respondent, acting upon instructions of the complainant, secured several carloads of onions and caused them to be shipped from loading points in the State of Texas to complainant at Philadelphia, Pa. Complainant alleged that a deficit of $340.08 was suffered on two cars; that the handling of two other cars resulted in total net proceeds of $82.70, which, together with rebates in the amount of $33.26 due the respondent by the complainant, when applied against the deficit left a balance of $224.12 due complainant.

Respondent denied the allegations of the complaint and set up a countercomplaint alleging he was employed by complainant to act in the capacity of a broker and that complainant was indebted to him in the amount of $71.13 representing earned brokerage and commissions.

Rulings included in Decision

1. Complainant failed to sustain the burden of proof in the proving of the allegations contained in the complaint; therefore the complaint was dismissed. It was apparently not until June, 1935 that the actual operations were begun by the parties. The respondent, under date of June 12, 1935, wired the complainant that he could buy a few cars of U.S. No. 2 onions at 75¢ and offered to work on joint account with the complainant. The respondent was promptly advised by the complainant that it was not interested in either buying or working on

joint account but "would like few cars guarantee advance". On June 12, 1935, the respondent advised the complainant by telegram that a few cars of U.S. No. 1 onions could be obtained at 75¢ and U.S. No. 2 onions at 45¢ guaranteed advance "protect our brokerage". The complainant, during the same day advised the respondent that it would "take couple cars U.S. No. 2 yellows if pack size good appearance 35¢ protect brokerage". The respondent in the majority of his wire offerings to the complainant used such expressions as "can buy" or "can obtain". Such terms as were ordinarily used by the respondent in his offerings to the complainant and the term "rebate Statler 3%" as used by the complainant in rendering accounts sales to the respondent are not usually associated with actual ownership, but indicate rather the relation of principal and agent. The evidence indicated that the respondent was acting in this instance as a so-called "solicitor".

2. Respondent also failed to present proof in substantiation of its countercomplaint to the effect that complainant was indebted to him in the sum of $71.13 but the complainant admitted being indebted to respondent for the so-called "rebates" in the amount of $33.26. Respondent was therefore awarded $33.26 with interest.

S-1488, March 4, 1937, Docket 2184: (S.P.)

WOLF & COHEN, PHILADELPHIA, PA. v. L. ZAVADOFF, INC. and/or ADAMS, KALECK & PINTO, BOTH OF PHILADELPHIA, PA.

Violation charged: Unjustified rejection of a carload of lettuce.
Principal points involved: Lack of proof of Adams, Kaleck & Pinto's connection with this transaction; buyer entitled to examine produce and until the examination is completed or waived he is under no obligation to accept; lack of proof of acceptance and existence of enforceable verbal contract.
Order: Complaint dismissed.

Outline of Facts

Complainants claimed that on or about September 17, 1935, they sold to L. Zavadoff, Inc., after inspection by L. Zavadoff, a carload, consisting of 294 crates of lettuce, at the agreed price of $2.25 per crate delivered, or a total of $661.50, less freight charges of $409.02, leaving a net cost of $252.48, which car had been shipped from Salinas, Calif. to complainants at

Philadelphia, Pa. on or about September 6; that respondent Zavadoff removed a number of crates from the car and then returned them and notified complainants that they refused to take possession of the contents of the car; that complainants were forced to replace and reload the crates which had been disturbed and were compelled to resell the car at a loss of $207.84, plus $5 to replace the crates which were removed, or a total of $212.84, for which an award was sought.

L. Zavadoff contended that he examined the lettuce and found that it varied as to quality and condition; that he telephoned Mr. Herman Wolf and told him what he found; that Mr. Wolf assured him the lettuce would break fine as it was a fresh shipment and that he, Mr. Wolf, would protect Mr. L. Zavadoff if it did not break to his satisfaction; that he took to his store 10 or 15 crates, which upon examination showed slime and decay; that the samples were immediately returned to the car and complainants notified that the lettuce was not satisfactory.

Rulings included in Decision

1. Although the complaint joined Adams, Kaleck & Pinto, it did not set forth any facts showing any connection between complainants and these respondents; on the contrary, it alleged that the entire transaction was one between complainants' representatives and L. Zavadoff, for and on behalf of L. Zavadoff, Inc. The complaint as to Adams, Kaleck & Pinto was therefore dismissed.

2. Complainants failed to prove the existence of an enforceable agreement between complainants and the respondent, L. Zavadoff, Inc. The agreement alleged in the complaint was a verbal one and falls within the Statute of Frauds. which makes the contract unenforceable, unless the complainants prove that the respondent accepted and actually received the commodity in question. Complainants attempted to show respondent's acceptance by alleging the removal of a number of crates from the car to respondents' store. While this may be some evidence of acceptance, it was not conclusive. The mere assent of the buyer to take the goods into his physical control did not operate as an assent to an acceptance or as a transfer of the property. A buyer, unless expressly precluded, is entitled to examine the commodity in order to decide whether he will become the owner and, until the examination is completed or waived, he is under no obligation to accept the commodity. Normally, an acceptance does not take place until the buyer has sufficiently examined the goods to understand their nature and quality. The burden of proof was upon the complainants to prove by the preponderance of the evidence the contract as alleged in the complaint and further

that the respondent accepted and actually received the lettuce in question, or a portion of it, in order to avoid the operation of the Statute of Frauds. The evidence failed to show that the respondent had done any act in relation to the commodity which necessarily involved the conclusions that he had taken them as owner. The complaint against L. Zavaodff, Inc. was therefore dismissed.

S-1495, March 5, 1937, Docket 2338: (S.P.)

MARKHAM PRODUCE CO., DES MOINES, IOWA v. COHEN & GORDON, CHICAGO, ILL.

Violation charged: Unjustified rejection of 2 carloads of potatoes.
Principal points involved: Insufficient proof of unjustified rejection; damages claimed by respondent were speculative and were not proved.
Order: Dismissed

Outline of Facts

On or about June 15, 1936, through a broker, complainant, by written contract, sold to respondent 3 carloads of California Shafter long white potatoes, U.S. No. 1, washed, at $2.90 per cwt. f.o.b. Shafter, Calif., the contract specifying that the cars were due at Kansas City June 15 and delivery was to be made to respondent at the Produce Terminal, Chicago, Ill. One car was shipped and accepted by respondent, and the other two arrived at Kansas City on June 16 and on the team track of the Chicago, Rock Island & Pacific R.R. Co. at Chicago on the morning of the 18th, never reaching the Chicago Produce Terminal. Respondent, upon arrival of the cars on team track on June 18, negotiated with the broker for an allowance by reason of the failure of the two cars to arrive at the time and place expected under the terms of the contract, stating that unless an allowance of 25¢ per cwt. were granted, the cars were rejected. Failing to receive a reply, respondent refused the cars to the carrier on June 19. The cars were resold by complainant, one for $711.24 and the other for $708.94 or a total of $1420.18, and complainant sought to recover loss of $259.82 caused by respondent's rejection.

Respondent contended that the cars were purchased with the distinct understanding that they were due at Kansas City on June 15 and they should have been available on the Chicago Produce Terminal in the early afternoon of June 16. By way of counterclaim respondent claimed $147.48, representing loss of profits sustained because the potatoes did not arrive at Kansas City on June 15 and therefore become available to respondent for the market of June 16. This sum was determined by taking the difference between the contract price and the quoted market price of potatoes on June 16.

Rulings included in Decision

1. The two cars did not arrive in Kansas City on June 15, but arrived on June 16, and on that date left for Des Moines and there on June 17 were diverted by complainant to respondent at the Produce Terminal at Chicago and arrived at Chicago on the morning of the 18th on the team track of the Chicago, Rock Island & Pacific R.R. Co. The contract required diversion on June 15 from Kansas City.

2. Complainant failed to prove that the rejection of the potatoes was without reasonable cause and the complaint was therefore dismissed.

3. The damages claimed by respondent against complainant by way of counterclaim were speculative and were not proven. The counterclaim was therefore dismissed.

S-1498, March 8, 1937, Docket 2356: (S.P.)

THE CASTELLINI CO., CINCINNATI, OHIO v. GITMAN BROTHERS, DAYTON, OHIO.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Burden on complainant to prove alleged terms of contract, concerning which parties disagree.
Order: Complaint dismissed.

Outline of Facts

On or about June 4, 1936, complainant and respondents, acting through their duly authorized agents, entered into a verbal contract for the purchase and sale of one carload of U.S. Grade No. 1 Triumph potatoes, at the agreed price of $4 per sack f.o.b. Bayou Sale, La. The car was shipped on June 3, destined to Cincinnati, Ohio via St. Louis, and arrived at Dayton, Ohio on or about June 8. It was rejected by respondents June 9. Complainant claimed the potatoes were resold at $3.75 per sack delivered and sought an award for loss and damage in the sum of $237.50.

Respondents contended that they entered into the contract "with the understanding that the said car of potatoes was in St. Louis at the time of purchase"; that the shipment, according to agreement, was due at Dayton on June 5, but did not arrive at that station until June 8; and that "because of claimant's breach of contract, respondents refused acceptance of the car". Complainant maintained that the shipment was purchased and sold on the basis of the potatoes having been shipped from Bayou Sale, La. on June 3 and routed via St. Louis.

Ruling included in Decision

In the absence of a note or memorandum setting forth the terms of the contract, any conclusion reached must necessarily be based to a large extent on the statements of the parties. A comparison of the conception of the conversation by the two parties showed a diametrically opposite interpretation of the terms of the contract, and particularly with respect to the location of the shipment at the time of consummation of the contract. The complainant having alleged that the contract was as stated in its conception of the conversation, was duty bound to prove it by a fair preponderance of the evidence. This it wholly failed to do and the complaint was therefore dismissed.

S-1500, March 8, 1937, Docket 2114: (S.P.)

HIRAM C. WYCKOFF, LODI, N.Y. v. N.B. WHITE, PHILADELPHIA, PA.

Violation charged: Failure to account for 857 baskets of sour cherries.
Principal points involved: Respondent liable for amount admitted to be due.
Order: Complainant awarded $102.38 with interest; publication of facts.

Outline of Facts

On or about July 20, 26, 27 and 30, and August 1, 2 and 6, 1934, complainant shipped and consigned in the current of interstate commerce to respondent at Philadelphia, Pa., 857 four-quart baskets of sour cherries. Respondent accepted and sold the cherries for the account of the complainant and rendered an account sales, but failed, neglected and refused to pay the complainant the net proceeds of $102.38, for which complainant sought an award.

In his verified answer, filed January 11, 1936, respondent admitted all the material allegations contained in the complaint and that he was indebted to complainant in the sum of $102.38 but stated he was unable to pay.

Ruling included in Decision

Respondent having admitted all the material allegations and the indebtedness alleged in the complaint, complainant was awarded $102.38 with interest.

S-1505, March 20, 1937, Docket 2248: (S.P.)

THE S.A. GERRARD CO., CINCINNATI, OHIO v. GARRETT-HOLMES & CO., KANSAS CITY, MO.

Violation charged: Unjustified rejection of a carload of plums.
Principal point involved: Plums which have orchard scars ranging from 3 to 6% in less than 1/3 of lot are of good merchantable quality.
Order: Complainant awarded $354.58 with interest; upon reconsideration, case dismissed.

Outline of Facts

On July 9, 1935, through a broker, complainant sold to respondent one carload of plums, consisting of 1087 baskets, at the agreed price of $1438.40. The broker issued a standard memorandum of sale describing the commodity, giving the size and price specifications of sale and stating as a special agreement "good quality, condition, pack arrival". Upon receipt of respondent's copy of the memorandum, respondent called the broker's attention to the wording of the special agreement and by letter

dated July 10 the broker amended it to read "provided quality, condition and pack is satisfactory to buyer on arrival at Kansas City". Upon arrival of the shipment at Kansas City respondent made inspection and refused it for the alleged reason that the plums "ran irregular, with some showing heavy percentage of scarred fruit, and that the pack was loose and unattractive". Complainant made resale at Washington, D.C. for a net return of $1083.82 and asked for an award for the loss sustained on the shipment.

It did not appear that Federal inspection was made at either origin point or at Kansas City. The load was inspected at Washington, D.C. July 19 by the Railroad Perishable Inspection Agency. The inspector then found that the plums were of good quality, clean and "fairly uniform size" but that the Climax variety showed from 3 to 6% "severe orchard scars".

Rulings included in Decision

1. Respondent's order was placed on the basis of the special agreement as amended. This was not denied by complainant.

2. The evidence indicated that the load was of good merchantable quality and condition and if a Federal inspection had been made the plums would have graded U.S. No. 1. Of the total of 1087 baskets, 298 were of the Climax variety. The inspection at Washington therefore showed that less than one-third of the total load showed "orchard scars" ranging from 3 to 6%. Applied to the lot as a whole, the orchard scarred plums averaged between 1 and 2%.

3. Respondent's refusal to accept the shipment amounted to an arbitrary rejection and was without reasonable cause. Complainant suffered loss and was damaged, due to respondent's rejection, in the sum of $354.58, for which amount, plus interest, complainant was awarded reparation.

Order Rescinded

On April 16, 1937, respondent filed a petition for rehearing. In reconsidering the action taken in this case, it appeared that the order issued by the Secretary on March 20, 1937 was based upon a prior decision entered in the case of Richman & Samuels, Inc. v. L. Yukon & Sons Produce Co., PACA Docket 1962, in which case the contract of sale contained similar specifications to those in the instant proceeding. That case was appealed to the U.S. District Court at Kansas City, Mo. and a judgment was entered Nov. 13, 1936 by that court in favor of L. Yukon & Sons Produce Co. and against Richman & Samuels, Inc., and reversed the orders of the Secretary issued in the administrative proceeding. Based upon the decision in that case, the Secretary, by Supplemental Order dated June 7, 1937, rescinded and set aside the order of March 20, 1937 and dismissed the complaint in this case.

S-1507, March 20, 1937, Docket 1561: (S.P.)

ADAMS PACKING CO., INC. AUBURNDALE, FLA. v. DeFEO FRUIT CO. KANSAS CITY, MO.

Violation charged: Unjustified rejection of a carload of tangerines.
Principal points involved: Lack of proof of the terms of the contract and breach thereof.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed to have sold to respondent, through a broker, a carload of tangerines, consisting of U.S. No. 1's, at $1.05 per box, and U.S. No. 2's, at 80¢ per box, f.o.b. Auburndale, Florida or for the total invoice price of $513; that complainant diverted a rolling car of the kind, quality and grade called for but respondent rejected it without reasonable cause; and that resale after rejection resulted in a net return of $229.85. Damages in the sum of $283.15 were asked.

Respondent's answer claimed the purchase was made over the phone from the broker, subject to inspection and acceptance at Kansas City, and respondent's witness testified to that effect.

Complainant submitted no evidence in support of the complaint except the exhibits that were attached to and made a part thereof. On complainant's application the deposition of the broker at Kansas City, Mo., who was alleged to have negotiated the sale, was regularly noticed for taking on two different occasions. The file indicated that the deposition of such witness was not taken on either of the dates fixed, or at all.

Ruling included in Decision

The proof failed to establish a contract of purchase and sale upon the terms, specifications and conditions set out in the complaint and respondent's answer and the testimony of the deposition witness failed to show a breach of any other or different contract. The file indicated that whatever arrangement or agreement was entered into between complainant acting through the broker and the respondent named in the complaint was oral. It did not appear that any note or memorandum of the alleged oral agreement was executed by respondent or issued by the broker. Respondent's answer failed to supply the proof necessary to support the complaint and it was not admitted in respondent's answer that the purchase was on the basis of Federal grades. Complaint therefore was dismissed.

S-1510, March 23, 1937, Docket 2167: (S.P.)

O.J. ODEGARD, PRINCETON, MINN. v. LOUIS WEINSTEIN, PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of onions.
Principal points involved: "Suitable for storage" is indefinite specification for onions; complainant must bear burden of proof that onions met that specification.
Order: Complaint dismissed.

Outline of Facts

On or about October 11, 1935, through a broker, complainant sold to respondent "one car U.S. No. 1 Yellow onions, 75% over 2" in peach color cottonet bags $1.00 per bag delivered. This extra nice car suitable for storage". Five hundred sacks of onions were shipped from Princeton, Minn. to respondent at Pittsburgh, Pa., but were rejected by respondent for the alleged reason that they were not suitable for storage as warranted by complainant. Complainant made resale for a net return of $221 and claimed damages of $174, including the cost of telegrams of $15, for which reparation was asked.

Respondent submitted sworn statements of several parties located in Pittsburgh to the effect that the onions tendered were not suitable for storage.

Federal inspection at Pittsburgh, Pa. on October 16, 1935 showed the onions to grade U.S. No. 1, "Stock is mature, generally well cured, generally clean and bright. Grade defects within tolerance. Stock is generally firm, a few slightly soft, in top layer of load generally dry, in most sacks in lower layers stock wet in center of bags. Less than 1% Bacterial Soft Rot affecting outer scales. Less than 1% sprouts 1 to 2 inches long".

Inspection was also made on October 16 by a representative of the Railroad Perishable Inspection Agency and the certificate read, in part: "Full pack. Fair, few only fair quality. Medium, 5 to 10% large, 3 to 5% small size. 1 to 3% ill shaped, few poorly topped, 4 to 6% dull or soil stained. Onions are firm and mature, occasional fairly firm, occasional sprouting. Find none to 2% average less than 1% soft rot". The inspector also reported some onions in the lower layers of sacks as damp to wet, apparently due to sweating.

Ruling included in Decision

The record disclosed that the term "suitable for storage" was one of the essential elements of the contract. The term seemingly has no definite meaning in the produce trade. In other words, onions considered by a seller as suitable for storage may not be so considered by a buyer at a distant point. There can be no definiteness in a contract of this kind. Complainant having agreed to deliver to respondent at Pittsburgh, Pa. onions suitable for storage, must bear the burden of proving by a fair preponderance of the evidence that the onions so tendered were in fact suitable for storage in accordance with the warranty. Complainant wholly failed to prove that the onions tendered to respondent were suitable for storage as warranted. The complaint was therefore dismissed.

S-1513, March 23, 1937, Docket 2380: (S.P.)

BEN MARKS CO., INC. PRESQUE ISLE, MAINE v. MARTIN R. NISSLY, HARRISBURG, PA.

Violation charged: Failure to fully pay for a carload of potatoes.
Principal points involved: Respondent acted as complainant's agent and his liability was only that of agent.
Order: Complainant awarded $161.86 with interest.

Outline of Facts

Complainant claimed that on or about October 6, 1934, complainant sold to respondent one carload of No. 1 Irish Cobbler potatoes at the agreed price of $2.10 per sack delivered at Harrisburg, Pa.; that thereafter complainant shipped the potatoes to respondent at Duncannon, Pa., consigned to Irving L. Halter; and that respondent accepted the potatoes and made part payment of the purchase price, leaving a balance of $200 due, for which an award was asked.

Respondent contended that the original purchase was made by him as agent for Irving L. Halter, of Duncannon, Pa.; that Irving L. Halter was unable and failed to pay the purchase price and complainant thereafter authorized storage of the potatoes; and that at a still later date, on the night of February 5, complainant authorized respondent to sell the lot at $1.90 per sack, less freight. Complainant admitted that this telephone conversation took place and that "prices of sale were mentioned but that question was the respondent's affair".

Ruling included in Decision

Respondent acted as complainant's agent in securing an order for the purchase of the carload of potatoes and his liability to complainant was that of an agent only. Complainant had reason to understand from respondent's opening wire dated October 2, 1934, that respondent was acting as the agent of another. He used the words "have order" and referred to "an option" on the third carload to be shipped November 15. Respondent's letter to complainant of October 6, named Irving L. Halter of Duncannon, Pa., as the consignee. In such letter respondent also referred to several other prospective buyers, and respondent requested that complainant "protect" him on these in the event any of the prospective purchasers should order from complainant direct. Each of respondent's wires and letters to complainant indicated that he was acting for another who, prior to the time shipment was made, was disclosed as Irving L. Halter. Moreover, it seemed clear that complainant consented to and approved of the storage of the potatoes following Halter's default in payment of the purchase price. Complainant, in its letter to respondent of November 27, 1934, recommended sale of the stored potatoes to another purchaser at $2 per sack. In this letter complainant stated "if you can put this sale through we think that it will be advisable to sell the potatoes at that price. This will give us the use of the money which we need very badly to carry on our operations at this end". It further appeared that complainant held the storage receipt. Complainant by letter dated January 11, 1935, addressed to the storage company referred to the "seed potatoes we have in storage with you", and directed delivery of the lot to respondent. Each of these circumstances seemed somewhat inconsistent with complainant's claim that respondent was the purchaser. The amount remaining due and owing to complainant from the proceeds of sale was $161.86, which amount respondent tendered to complainant on or about September 12, 1936. Complainant was awarded that amount, without interest, because interest to the date of respondent's tender on September 12 was then included. The issues being thus resolved in respondent's favor, it was not necessary to publish the facts and circumstances.

S-1515, March 23, 1937, Docket 2238: (S.P.)

SMITH-CANASTOTA, INC., CANASTOTA, N.Y. v. CHARLES CIANCIOLO, CLEVELAND, OHIO.

Violation charged: Unjustified rejection of a carload of onions.
Principal points involved: Specification "suitable for storage" indefinite; complainant failed to prove the onions met this specification.
Order: Dismissed.

Outline of Facts

In the month of October, 1935, complainant sold to respondent one carload of yellow onions warranted as grade U.S. No. 1 and "suitable for storage" at the agreed price of $1.15 per bag delivered at Cleveland, Ohio. Complainant made shipment from Elba, N.Y., but respondent rejected it upon arrival for the alleged reason that the onions were not suitable for storage as warranted by complainant. Complainant claimed to have suffered $116.60 loss because of the rejection.

Ruling included in Decision

Complainant failed to prove by a fair preponderance of the evidence that the onions were suitable for storage as warranted. The term seemingly has no definite meaning in the produce trade and there can be no definiteness in a contract of this kind. The complainant having agreed to deliver to the respondent at Cleveland, Ohio, onions suitable for storage, must bear the burden of proving by a fair preponderance of the evidence that the onions met that warranty. The complaint was therefore dismissed.

S-1520, March 30, 1937, Docket 2361: (S.P.)

ECKERT BROS., RACINE, WISCONSIN v. B.D. ANGUISH & CO., CHICAGO, ILLINOIS.

Violation charged: Failure to pay for services claimed to have been rendered in purchasing cabbage as respondent's agent.
Principal point involved: Complainant failed to prove the terms of the contract.
Order: Dismissed.

Outline of Facts

During the month of October, 1935, there were shipped from loading points in the State of Wisconsin to respondent at Chicago, Illinois 3 carloads of cabbage. Complainant claimed that the cabbage comprising said shipments was purchased, loaded and shipped for and on behalf of respondent and as respondent's agent and that such agency agreements were entered into and consummated through and as the result of oral negotiations, by the terms of which it was to be compensated at the rate of $1 per ton for the purchase of the cabbage. Complainant asked for damages amounting to $283.60.

Respondent denied that any agency agreement was entered into and stated that the first car was bought from complainant but did not meet complainant's warranty and that complainant authorized respondent "to go ahead and do the best we could with the car", the sale resulting in a deficit of $85; that the second car did not conform to the warranty made by complainant when the purchase was made and that complainant authorized respondent "to do the best we could with it", sale being made for a net return of $30.95; and that the third car was bought at $10 per ton and was remitted for on that basis.

Ruling included in Decision

Complainant had the burden of proof but the evidence submitted was insufficient to establish the terms, conditions and agreements of the oral contracts which complainant asserted were entered into. One such contract was identified by date and place and that it was entered into on the part of complainant by Ernest R. Eckert. The other oral agreements relied upon were in no manner identified as to date or names of individuals participating, nor was the substance of what was said established. No evidence tending to corroborate the claimed oral agreements, such as telegrams or letters exchanged between the parties, was produced, apparently because none existed. While shipment of the cabbage by complainant contemplated some prior understanding concerning the disposition thereof, such fact of shipment was equally as consistent with respondent's contention that the carloads were purchased outright as with complainant's claim that they were purchased from farmers and forwarded to respondent as its agent for the agreed compensation of $1 per ton. The complaint was therefore dismissed.

S-1521, March 30, 1937, Docket 2440: (Hearing)

CLOWE & DAVIS, INC. WASHINGTON, D.C. v. G. FAVA FRUIT CO., INC. BALTIMORE, MD.

Violation charged: Failure truly and correctly to account for 100 crates of lettuce.
Principal points involved: Burden on complainant to prove terms of contract; damages awarded complainant in amount respondent admitted to be due.
Order: Complainant awarded $360.37.

Outline of Facts

On or about August 7, 1936, by telephone complainant sold to respondent a truckload of 100 crates of lettuce at the agreed price of $5.25 per crate f.o.b. Washington, D.C. The lettuce was transported by truck hired by respondent from Washington, D.C. to Baltimore, Md., where it was delivered early on the morning of August 8. Within a few hours after arrival of the shipment at respondent's place of business respondent notified complainant that the lettuce was not up to respondent's idea of the quality which complainant agreed to furnish. Complainant claimed that the lettuce was inspected by complainant at its place of business on the date of sale "and was found to be good condition and good lettuce as sold to respondent", that when respondent asked for a reduction off the purchase price it was refused by complainant, and that respondent's later tender of a purported account sales and check to cover what respondent contended was due was refused.

Respondent contended that it contracted for strictly fancy lettuce and that the lettuce received was of poor quality; that respondent was instructed by complainant by phone to dispose of the lettuce and that on or about August 11 respondent tendered to complainant an account sales and check for the net proceeds of $360.37, which were refused.

Testimony was offered in support of the contentions of both sides by deposition and witnesses at the hearing.

Ruling included in Decision

Complainant failed to prove the terms of the contract as alleged in the complaint which would be dismissed if it were not for respondent's admission of indebtedness to complainant in the sum of $360.37. The testimony furnished by the parties in the case was highly conflicting with reference to the quality and grade of lettuce purchased by respondent and also concerning whether respondent had reason to believe that it had authority to handle the lettuce for complainant's account. The burden of proof in the first instance was upon the complainant. Complainant was awarded $360.37, respondent's check for which amount was held in the Bureau's file and ordered forwarded to complainant.

S-1525, April 2, 1937, Docket 2310: (S.P.)

C.A. POWERS & CO., FORT FAIRFIELD, MAINE v. TONY FISH, NEW YORK, N.Y.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal point involved: Respondent's rejection justified as car held on track 5 days considered as not meeting specification "freshly loaded".
Order: Complaint dismissed.

Outline of Facts

On or about May 8, 1936, through a broker, complainant sold to respondent one carload of Maine Green Mountain potatoes warranted to grade U.S. No. 1, at the total agreed price of $753.31 delivered to respondent at Harlem River Station, New York City. The potatoes were loaded at Fort Kent, Maine on April 30, 1936 and moved from loading point on May 5. Respondent rejected the shipment, stating that "the shipment was misrepresented as to condition as it had been loaded about the 30th of April and held on track, while" the broker "had informed us that it was freshly loaded although a roller".

Ruling included in Decision

Respondent's refusal to accept the shipment did not amount to a rejection without reasonable cause. Considering the time of year the purchase was made it seemed clearly reasonable that respondent would have required "freshly loaded" stock. Accepting the "freshly loaded" specification as a controlling condition of the purchase and sale, it was not enough to say that notwithstanding such specification the potatoes tendered by complainant conformed to grade and should have been accepted. Such condition seemed to have been considered by respondent as an important and therefore material matter in addition to the specific grade requirement. The complaint was therefore dismissed.

S-1530, April 14, 1937, Docket 2333: (S.P.)

CHARLTON-DAVIS CO., INC. NORFOLK, VA. v. McCLELLAND-KENNARD CO. BARNESVILLE, OHIO and/or GEORGE T. DIGBY CO., INC. WHEELING, W. VA.

Violation charged: False and misleading statements; unjustified rejection of a carload of sweetpotatoes.
Principal points involved: Cause of action must be proved; lack of allegation and proof of fraudulent purpose of false or misleading statement prevents order for damages.
Order: Complaint dismissed.

Outline of Facts

On or about December 10, 1935, through the negotiations of Geo. T. Digby Co., Inc. as broker, complainant sold to McClelland-Kennard Co., one car of U.S. No. 1 kiln dried sweetpotatoes. The car was shipped from loading point in Virginia to Barnesville, Ohio, where it was refused by McClelland-Kennard Company on the ground that it purchased yellow sweetpotatoes and not Cuban yams. Complainant contended that, by reason of the admitted order for kiln dried sweetpotatoes, it was justified in shipping kiln dried Cuban yams, particularly in view of a letter mailed to Geo. T. Digby Co., Inc. on November 9, 1934, which stated "all our kiln dried potatoes are Cuban Yams". Geo. T. Digby Co., Inc. claimed that during a telephone conversation between complainant and Digby Company complainant was advised that it was impossible for

respondent to sell Cuban Yams in the territory served by it as broker and that McClelland-Kennard Company could not market or sell same and that complainant fully understood that whenever an order was obtained for sweetpotatoes it meant Yellow sweetpotatoes, and offered affidavits in support thereof and a toll slip from the telephone company billing respondent for a telephone call to Norfolk, Va. to evidence such a conversation on November 27, 1935. Complainant charged Geo. T. Digby Co., Inc with having made false and misleading statements and McClelland-Kennard Co. with unjustified rejection and asked for damages in the amount of the difference between the amount for which Geo. T. Digby Co., Inc. represented to complainant that the sweetpotatoes had been sold and the amount realized by complainant from resale following rejection.

Rulings included in Decision

1. Complainant failed to prove that it tendered the kind, grade and quality of sweetpotatoes contemplated by the parties under the contract of sale. Complainant, in order to recover from McClelland-Kennard Co. must prove by a preponderance of the evidence the facts necessary to maintain the cause of action alleged. The respondent interposed a good defense which must be avoided by complainant if complainant were to prevail. Complainant, in the avoidance of these facts, merely denied a recollection of the statements alleged to have been made during the telephone conversation. Offsetting this denial were the affidavits of the managers of the respondent firms. While it is difficult to prove or disprove an alleged oral conversation, the complainant could have enhanced its position and contention by stating what was said during the conversation held on November 27. Complainant could also have secured an order to take the depositions of the two managers and questioned them fully with reference to the telephone conversation on November 27. The statements set forth in the two affidavits with reference to the said telephone conversation were unimpeached except by a mere denial of recollection. Therefore, it was concluded that complainant failed to avoid the defense interposed and the complaint was dismissed as to McClelland-Kennard Co.

2. Complainant failed to prove that Geo. T. Digby Co., Inc. uttered for a fraudulent purpose any false or misleading statements. To support an order for reparation for damages resulting from an alleged false or misleading statement made by a commission merchant, dealer or broker, it must be alleged and shown that a false or misleading statement was made and that it was made for a fraudulent purpose. While it was alleged that Geo. T. Digby Co., Inc. was guilty of uttering a false or misleading statement, there was no allegation that said statement was made for a fraudulent purpose, nor did the evidence submitted by the complainant show any false or misleading statement made for a fraudulent purpose. The complaint was therefore dismissed as to Geo. T. Digby Co., Inc.

S-1545, May 13, 1937, Docket 2025: (S.P.)

L.T. RHODES, BAY MINETTE, ALABAMA v. A. HUIZINGA & SONS, CHICAGO, ILL.

Violation charged: Unjustified rejection of a carload of potatoes.
Principal points involved: Buyer not bound when broker fails to make a valid contract of sale; broker responsible for loss occasioned by rejection through false representation that a sale had been made; such false representation makes broker guilty of violation of section 2 of act.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on or about May 13, 1935, through a broker C.H. Robinson Co., Chicago, Illinois he sold to respondent one carload of U.S. No. 1 Triumph potatoes at the agreed price of $2 per cwt. delivered at Chicago, Ill.; that the potatoes were shipped from Foley, Alabama to respondents at Chicago, were rejected by respondents and resold by complainant at a loss of $70, the difference between the total net sale price to respondents and the net amount realized upon resale, for which amount complainant asked for an award.

Respondents contended that on May 13 they transmitted to the broker an offer to purchase a carload of U.S. No. 1 Triumph potatoes, clean, bright, sound stock, at an f.o.b. price of $1.50 per cwt.; that on the same day during a telephone conversation the broker informed one of respondents that complainant would confirm a car of "fairly clean" U.S. No. 1 at $1.40 per cwt. f.o.b.; that respondent advised the broker the specification "fairly clean" was not satisfactory and that he should wire complainant an offer of $2 delivered Chicago on terms of "inspection acceptance Chicago"; that on May 14 the broker advised respondent his last offer had been accepted and confirmed; that on May 15 respondent received through the mail brokers standard memorandum of sale which did not show terms and specifications confirming the oral understanding; that the broker was immediately informed and asked to call at respondents' office for the memorandum of sale but he failed to do so and it was returned by mail on May 16; that respondents rejected the car after inspection at Chicago showed the potatoes were "fairly clean to slightly dirty***".

The copy of the broker's memorandum of sale dated May 13 submitted by complainant called for a car of U.S. No. 1 Alabama Triumph potatoes at $2 per cwt. delivered Chicago "shipper describes as reasonably clean". A certificate of Federal inspection made at Chicago showed that the potatoes were fairly clean to slightly dirty.

Rulings included in Decision

1. The record supported the contention of the respondents that the broker failed to negotiate a valid and binding contract of sale. The wires quoted in the decision clearly showed that the respondents wanted "clean" potatoes and were willing to pay a premium for stock meeting that specification. Complainant did not file an opening statement of facts and there was nothing in the record tending to refute the respondents' verified statement that the broker's memorandum of sale did not conform to the oral understanding between respondents and the broker and that respondents made immediate objection upon receipt of their copy of the memorandum of sale.

2. The evidence appeared sufficient to show that the broker was responsible for the loss sustained by the complainant. It has been repeatedly held in decisions under this Act that a broker in representing that a sale has been made, when in fact it has not, is guilty of making a false and misleading statement in violation of section 2 of the Act and is liable for the damages resulting therefrom. However, the broker was not named as a respondent in the complaint and complainant is now barred by the nine months period limitation from filing a complaint against the broker.

S-1546, May 20, 1937, Docket 2156: (S.P.)

ANDREWS BROTHERS, INC. LOS ANGELES, CALIF. v. D.H. BAGDASARIAN & SONS, INC. FRESNO, CALIF.

Violation charged: Failure to deliver 9 carloads of grapes.
Principal point involved: Existence of contract must be proved by complainant.
Order: Complaint dismissed as to 9 cars; complainant awarded $92.80, with interest on the car shipped.

Outline of Facts

Complainant claimed that on or about October 18, 1934, respondent by verbal contract agreed to deliver to complainant ten carloads of table quality Emperor grapes to be handled by complainant on joint account, complainant to make a guaranteed advance of 80¢ per lug f.o.b. shipping point, the cars to be shipped one a day beginning October 23; that on October 18 complainant drew a check for $1000 in favor of respondent and noted on its face "Advance on 10 cars Emperors" and delivered same to respondent, who accepted the check and cashed it; that on October 24, complainant shipped one carload, which was sold and netted $201.60 above the guaranteed advance, one-half of which was credited to the account of respondent; and that respondent failed to ship the other 9 carloads, thereby causing complainant to suffer damage and loss in the sum of $1453.60, for which an award was asked.

Respondent maintained that only one car was contracted for and that complainant's check when presented to respondent did not bear the notation "advance on 10 cars Emperors".

The invoice dated October 24 carried the notation: "80¢ guarantee - split profits". "In the event car brings less than guarantee the shipper will not share any losses".

Rulings included in decision

1. The evidence presented by complainant failed to establish a contract for 10 cars of Emperor grapes as alleged by complainant. The burden to prove a contract for ten cars was upon complainant. The contract alleged was a verbal one; the testimony of the parties was conflicting; and the surrounding circumstances concerning the alleged contract did not materially aid the contentions of the complainant. No specific demand for shipment of the additional 9 cars was made until November 7. It hardly seemed reasonable that, if respondent contracted to deliver 10 cars instead of one car, complainant would have waited until November 7 to make a specific demand for the remaining 9 cars. The complaint was therefore dismissed as to the 9 cars.

2. Respondent's failure to account for the balance due out of the advance made was in violation of section 2. The guaranteed advance on the car shipped was $806.40, which, deducted from the $1000 accommodation advance, would leave an amount due complainant of $193.60. The car was sold for a profit of $201.60, one-half of which, or $100.80, was due and credited to respondent, and the difference between $193.60 and $100.80, or $92.80, was due and owing complainant. An award was therefore made to complainant of that amount plus interest.

S-1549, June 7, 1937, Docket 2337: (S.P.)

H. ROTHSTEIN & SONS, INC., PHILADELPHIA, PA. v. SACKS BROS., LIBERTY, N.Y.

Violation charged: Unjustified rejection of a carload of tomatoes.

Principal points involved: Broker's standard memorandum of sale reflected the true contract; "Straight Pack" deemed to mean "U.S. Straight Pack"; "mostly fairly uniform sizing" means 55 to 90% of the load was fairly uniform in size, and lot did not meet specification "straight pack".

Order: Complaint dismissed.

Outline of Facts

On June 19, 1936, through a broker, complainant sold to respondent one carload of U.S. No. 1 Skyway brand tomatoes at the agreed price of $1.40 per lug f.o.b. Maydelle, Texas, described as then being in transit and "straight pack, mature green". Upon arrival at Liberty, N.Y., respondent refused to accept the shipment and complainant claimed it was resold for a net of $643.78 and asked for an award of $283.52 for loss and damage sustained.

Respondent claims the purchase consisted of 560 lugs, made up of a specified number of lugs of designated sizes and that the load did not conform to sale specifications as the tomatoes were not "mature green", were not "U.S. straight pack" and it exceeded in quantity the number of lugs purchased. Complainant contended that its wire to the broker on June 19 and the broker's answer thereto called for a "carload" and that a minimum weight carload of 20,000 lbs. consists of approximately 650 lugs.

The standard memorandum of sale issued by the broker on June 19 listed the number and size of the lugs as follows: 4x5 - 17; 5x5 - 54; 5x6 - 108; 6x6 - 368; 6x7 - 13. The number of lugs listed total 560. The total number shipped in the car was 650. The invoice listed 458 size 6x6 instead of 368 as specified by the broker in its memorandum of sale.

Rulings included in Decision

1. The broker's memorandum of sale reflected the true contract of the parties. If the wires had been exchanged directly between complainant and respondent they would constitute the contract, but here the contract was made through the broker. So far as the record showed, no specifications or representations were made other than those stated in the broker's memorandum of sale.

2. The load tendered by complainant did not conform to the specifications. It contained 90 lugs packed 6x6 in excess of the number purchased. The U.S. standards for fresh tomatoes include specifications for U.S. standard packs, among which is U.S. Straight Pack. In view of the fact that the U.S. tomato grades are in general use by the produce industry, the term "straight pack" was deemed to mean U.S. Straight Pack. U.S. Standard Packs for fresh tomatoes provide that "U.S. Straight Pack" tomatoes "shall be fairly uniform in size and fairly tightly

packed". It is further provided that "in order to allow for variations incident to proper packing, not more than 10%, by count, of the containers in any lot may not meet the requirements for any described pack". The Federal-State of Texas inspector at the Texas loading point certified that the load was "mostly fairly uniform sizing". By use of the word "mostly" the inspector meant from 55 to 90 per cent of the load was fairly uniform in size. The Federal inspector at Boston, the final destination of the load, certified that "in most lugs" the tomatoes were fairly uniform in size. It seemed reasonably clear from such evidence that less than 90 per cent of the load was "straight pack" as specified by the broker.

3. Respondent's rejection was not without reasonable cause and the complaint was therefore dismissed.